FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Pages 22009–22356

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov*.

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com*.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register**, including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov*.

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 77 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

Printed on recycled paper.

Contents

Federal Register

Vol. 79, No. 76

Monday, April 21, 2014

Agriculture Department
See Animal and Plant Health Inspection Service
See Farm Service Agency
See Food Safety and Inspection Service
See Forest Service
See Grain Inspection, Packers and Stockyards Administration
See National Agricultural Statistics Service
See National Institute of Food and Agriculture
See Natural Resources Conservation Service
See Rural Business-Cooperative Service

Air Force Department
NOTICES
Meetings:
U.S. Air Force Academy Board of Visitors, 22105–22106

Animal and Plant Health Inspection Service
PROPOSED RULES
Single Label Claim for Veterinary Biological Products:
Viruses, Serums, Toxins, and Analogous Products, 22048–22051

Army Department
See Engineers Corps

Blind or Severely Disabled, Committee for Purchase From People Who Are
See Committee for Purchase From People Who Are Blind or Severely Disabled

Census Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
2014–2016 Company Organization Survey, 22097–22098

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22142–22143

Coast Guard
RULES
Safety Zones:
Blue Water Resort and Casino West Coast Nationals, Parker, AZ, 22023–22025
Lucas Oil Drag Boat Racing Series, Thompson Bay, Lake Havasu City, AZ, 22020–22023
PROPOSED RULES
Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations, 22071–22072
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22153–22154

Commerce Department
See Census Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Privacy Act; Systems of Records, 22097

Committee for Purchase From People Who Are Blind or Severely Disabled
NOTICES
Procurement List; Additions and Deletions, 22103–22105

Defense Acquisition Regulations System
RULES
Defense Federal Acquisition Regulation Supplement:
Clauses with Alternates—Contract Financing, 22042–22043
Clauses with Alternates—Transportation, 22036–22041
Contracting Officers Representative, 22036
Photovoltaic Devices, 22041–22042

Defense Department
See Air Force Department
See Defense Acquisition Regulations System
See Engineers Corps
NOTICES
Privacy Act; Systems of Records; Correction, 22105

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Annual Student Activities Report, 22106–22107
Race to the Top—District Annual Performance Report, 22107
Annual Updates to the Income Contingent Repayment Plan Formula for 2014:
William D. Ford Federal Direct Loan Program, 22107–22113
Applications for New Awards:
Personnel Development to Improve Services and Results for Children with Disabilities, etc., 22114–22122
Promoting the Readiness of Minors in Supplemental Security Income Technical Assistance Center, 22122–22129
Meetings:
President's Advisory Commission on Asian Americans and Pacific Islanders, 22129–22130

Energy Department
See Federal Energy Regulatory Commission
RULES
Energy Conservation Program:
Test Procedure for Commercial Refrigeration Equipment, 22278–22318
Test Procedures for Refrigerators, Refrigerators-Freezers, and Freezers, 22320–22356

Engineers Corps
PROPOSED RULES
Clean Water Act; Definitions:
Waters of the United States, 22188–22274
NOTICES
Clean Water Act:
Certain Agricultural Conservation Practices Exemption from Permitting, 22276

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Northern Mariana Islands; Prevention of Significant Deterioration; Special Exemptions from Requirements of the Clean Air Act, 22032–22036
Delegation of Authority Provision in the Prevention of Significant Deterioration Program, 22028–22032
PROPOSED RULES
Clean Water Act; Definitions:
Waters of the United States, 22188–22274
Ocean Dumping:
Final Site Designations; Proposed Cancellation and Modification, 22073–22076
NOTICES
Clean Water Act:
Certain Agricultural Conservation Practices Exemption from Permitting, 22276
Proposed Withdrawal of One Total Maximum Daily Load under the Clean Water Act, 22132

Farm Service Agency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Volunteers Program, 22080

Federal Aviation Administration
RULES
Helicopter Air Ambulance; Commercial Helicopter; Helicopter Operations, 22009–22012
PROPOSED RULES
Airworthiness Directives:
Bombardier, Inc. Airplanes, 22069–22071
NOTICES
Environmental Assessments; Availability, etc.:
Proposed Part 139 Operating Certificate, Related Actions; Paulding Northwest Atlanta Airport, 22177–22178

Federal Deposit Insurance Corporation
PROPOSED RULES
Regulations Transferred from Office of Thrift Savings and Rules of Practice and Procedure, 22056–22063
Securities of State Savings Associations and Securities of Nonmember Insured Banks, 22063–22069

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 22132

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 22130–22131

Federal Railroad Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22178–22181

Federal Register Office
NOTICES
Agreements between American Institute in Taiwan and Taipei Economic and Cultural Representative Office in the United States, 22161–22166

Federal Register, Administrative Committee
See Federal Register Office

Federal Reserve System
NOTICES
Changes in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 22132
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 22132–22133
Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities, 22133

Federal Retirement Thrift Investment Board
NOTICES
Meetings; Sunshine Act, 22133

Federal Trade Commission
NOTICES
Consent Agreements:
Akorn Enterprises, Inc., and Hi-Tech Pharmacal Co., Inc., 22133–22136
Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, 22136–22142

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
Lepidium papilliferum (Slickspot Peppergrass); Threatened Status, 22076–22077
Lepidium papilliferum; Critical Habitat Designation; Correction, 22077–22079
NOTICES
Stock Assessment Reports:
Pacific Walrus and Northern Sea Otters, 22154–22159

Food and Drug Administration
RULES
Medical Devices:
Ophthalmic Devices; Classification of the Eyelid Weight, 22012–22016
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Risk and Benefit Perception Scale Development, 22143–22146
Meetings:
Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee, 22147–22148
Next-Generation Sequencing Technology, Data Formats Standardization and Promotion of Interoperability Protocols, 22147
Oncologic Drugs Advisory Committee, 22146
Selections Process for Non-Voting Industry Representatives, 22148

Food Safety and Inspection Service
PROPOSED RULES
Accredited Laboratory Fees, 22052–22054
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Meat Slaughter Industry Survey, 22080–22082
Best Practices Guidances:
Controlling Listeria monocytogenes in Retail Delicatessens, 22082–22083
Compliance Guidelines for Allergens and Ingredients of Public Health Concern:
Identification, Prevention and Control, and Declaration through Labeling, 22083–22084

Hazard Analysis and Critical Control Point Plan Reassessment:
Not-Ready-To-Eat Comminuted Poultry Products; Related Agency Verification Procedures, 22084–22090

Forest Service
NOTICES
Meetings:
Wrangell Petersburg Resource Advisory Committee, 22090–22091

Grain Inspection, Packers and Stockyards Administration
NOTICES
Designations:
Owensboro, KY; Bloomington, IL; Iowa Falls, IA; Casa Grande, AZ; Fargo and Grand Forks, ND; Plainview, TX, 22091
Opportunities for Designations:
Bloomington and Decatur, IL, 22092

Health and Human Services Department
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

Homeland Security Department
See Coast Guard
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22151–22152
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Regulation on Agency Protests, 22152–22153

Interior Department
See Fish and Wildlife Service
See Land Management Bureau

International Trade Administration
NOTICES
Antidumping Duty New Shipper Reviews; Results, Extensions, Amendments, etc.:
Fresh Garlic from the People's Republic of China, Shijiazhuang Goodman Trading Co., Ltd., 22098–22099

Labor Department
See Occupational Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Alien Employment Certification, 22159–22160

Land Management Bureau
NOTICES
Meetings:
Farmington District Resource Advisory Council, New Mexico, 22159

Maritime Administration
NOTICES
Requests for Administrative Waivers of the Coastwise Trade Laws:
Vessel AIR BENDER, 22182–22183
Vessel CARIBBEAN SPIRIT, 22182
Vessel ESCAPE TO, 22181–22182

National Aeronautics and Space Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22160–22161

National Agricultural Statistics Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22092–22094

National Archives and Records Administration
See Federal Register Office

National Credit Union Administration
NOTICES
Meetings; Sunshine Act, 22166

National Highway Traffic Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22183
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Reports, Forms, and Recordkeeping Requirements, 22183–22185

National Institute of Food and Agriculture
NOTICES
Request for Applications:
Veterinary Medicine Loan Repayment Program, 22094–22095

National Institutes of Health
NOTICES
Meetings:
Eunice Kennedy Shriver National Institute of Child Health and Human Development, 22149–22150
Fogarty International Center, 22148–22149
National Heart, Lung, and Blood Institute, 22149
National Institute of Nursing Research, 22149–22150

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Northeastern United States:
Northeast Multispecies Sector Vessels Access to Year-Round Closed Areas, 22043–22047
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Marine Recreational Information Program, Hawaii Mail-in Survey for Shore Fishing Effort, 22099–22100
Meetings:
Advisory Committee to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas, 22102–22103
National Climate Assessment and Development Advisory Committee, 22101–22102
Pacific Fishery Management Council, 22100–22101
Western Pacific Fishery Management Council, 22100–22101

National Science Foundation
NOTICES
Requests for Nominations:
Directorate and Office Advisory Committees, 22166–22167

Natural Resources Conservation Service
NOTICES
National Handbook of Conservation Practices; Proposed Changes, 22095–22096

Nuclear Regulatory Commission
PROPOSED RULES
Spent Fuel Storage and Disposal:
Safety and Environmental Regulations; Revision and Integration, 22055–22056
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22167–22168
Meetings:
Advisory Committee on Reactor Safeguards Subcommittee on Plant License Renewal, 22168
Meetings; Sunshine Act, 22168–22169

Occupational Safety and Health Administration
RULES
Vertical Tandem Lifts, 22018–22020

Postal Regulatory Commission
NOTICES
New Postal Products, 22169–22170

Postal Service
RULES
Rules of Practice in Proceedings under the Debt Collection Act, 22025–22028

Rural Business-Cooperative Service
NOTICES
Meetings:
2014 Farm Bill Implementation Listening Session—Value-Added Producer Grant Program, 22096–22097

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
C2 Options Exchange, Inc., 22170–22172
International Securities Exchange, LLC, 22172
National Securities Clearing Corp., 22174–22177
NYSE Arca, Inc., 22172–22174

State Department
RULES
Public Diplomacy Program Material within the United States; Availability, 22016–22018
NOTICES
Meetings:
U.S. Advisory Commission on Public Diplomacy, 22177

Statistical Reporting Service
See National Agricultural Statistics Service

Substance Abuse and Mental Health Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 22150–22151

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See Maritime Administration
See National Highway Traffic Safety Administration

Veterans Affairs Department
NOTICES
Meetings:
Research Advisory Committee on Gulf War Veterans' Illnesses, 22185

Separate Parts In This Issue

Part II
Defense Department, Engineers Corps, 22188–22274
Environmental Protection Agency, 22188–22274

Part III
Defense Department, Engineers Corps, 22276
Environmental Protection Agency, 22276

Part IV
Energy Department, 22278–22318

Part V
Energy Department, 22320–22356

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

9 CFR

Proposed Rules:

112 22048
391 22052

10 CFR

429 (2 documents) 22278, 22320
430 22320
431 22278

Proposed Rules:

51 22055

12 CFR

Proposed Rules:

308 22056
335 22063
390 (2 documents) 22056, 22063

14 CFR

91 22009
120 22009
135 22009

Proposed Rules:

39 22069

21 CFR

886 22012

22 CFR

173 22016

29 CFR

1917 22018

33 CFR

165 (2 documents) 22020, 22023

Proposed Rules:

1 22071
328 22188

39 CFR

961 22025

40 CFR

52 (2 documents) 22028, 22032
69 22032

Proposed Rules:

110 22188
112 22188
116 22188
117 22188
122 22188
228 22073
230 22188
232 22188
300 22188
302 22188
401 22188

48 CFRq

201 22036
212 22036
216 22036
247 22036
252 (3 documents) 22036, 22041, 22042

50 CFR

648 22043
697 22043

Proposed Rules:

17 (2 documents) 22076, 22077

Rules and Regulations

Federal Register
Vol. 79, No. 76
Monday, April 21, 2014

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 120, and 135

[Docket No.: FAA–2010–0982; Amdt. Nos. 91–330, 120–2; 135–129]

RIN 2120–AK47

Extension of Effective Date for the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations Final Rule

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of effective date and request for comments.

SUMMARY: The FAA is delaying the effective date of the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule published on February 21, 2014. In that rule, the FAA amended its regulations to revise the helicopter air ambulance, commercial helicopter, and general aviation helicopter operating requirements. The April 22, 2014 effective date does not provide an adequate amount of time for the affected certificate holders to implement the new requirements. By extending the effective date to April 22, 2015, the affected certificate holders will have sufficient time to implement the new requirements. This action will only affect the effective date of the provisions of the rule scheduled to take effect April 22, 2014. Other provisions in the rule with specified compliance dates will not be affected.

DATES: The effective date of the rule amending 14 CFR Parts 91, 120, and 135 published February 21, 2014 (79 FR 9932), is delayed until April 22, 2015. The amendment to § 135.293 in this document is effective April 22, 2015.

Submit comments on or before May 21, 2014.

ADDRESSES: Send comments identified by docket number FAA–2010–0982 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Andy Pierce, Air Transportation Division, AFS–200, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8238; email *andy.pierce@faa.gov*.

For legal questions concerning this action, contact Dean E. Griffith, Office of Chief Counsel, AGC–220, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3073; email *dean.griffith@faa.gov*.

SUPPLEMENTARY INFORMATION:

Good Cause for Dispensing With Notice and Comment and for Immediate Adoption

Section 553(b)(3)(B) of Title 5, United States Code, (the Administrative Procedure Act) authorizes agencies to dispense with notice and comment procedures for rules when the agency for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

The FAA finds that prior notice and public comment to this final rule are contrary to the public interest. This final rule extends the effective date for the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule from April 22, 2014 to April 22, 2015. By extending the effective date, affected entities will have sufficient time to implement the new requirements. Without the extension of the effective date, regulated entities would not have sufficient time to prepare to meet the new requirements that were scheduled to take effect April 22, 2014. If these entities are not prepared to meet the new requirements then, beginning April 23, 2014, they would not be able to continue conducting part 135 operations and would not be able to meet the new part 91 requirements. Therefore, the FAA has determined that prior notice and public comment are contrary to the public interest.

The Administrative Procedure Act also allows agencies to dispense with the 30-day delayed effective date requirement for "good cause found and published with the rule." 5 U.S.C. 553(d)(3). The FAA has determined that good cause exists to make this rule immediately effective upon publication. As discussed above the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule takes effect April 22, 2014. If the delay of the effective date is not made immediately effective there would be a period of time under which certificate holders would be in jeopardy of not being able to continue part 135 operations because of inability to satisfy the new requirements and part 91 operators would not be able to meet new requirements applicable to them. The delayed effective date must take effect

before April 22, 2014 to ensure certificate holders can continue to operate.

Comments Invited

The FAA is adopting this final rule without prior notice and public comment because delaying the amendment could result in a negative impact to certificate holders conducting part 135 rotorcraft operations, part 91 rotorcraft operators, and the public that relies on those certificate holders. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 11034; Feb. 26, 1979), provide that to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice. All comments will be considered by the Administrator and this amendment may be changed in light of the comments received. We note that, although the FAA will consider comments, this rule will be effective upon publication of this document in the **Federal Register**.

Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106(f) describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701. Under that section, the FAA is charged with prescribing regulations and minimum standards for practices, methods and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses safety of rotorcraft operations.

I. Overview of Final Rule With Request for Comments

This final rule with request for comments extends the effective date for the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule published on February 21, 2014 (79 FR 9932). In that rule, the FAA established several operational rules for part 91 rotorcraft operators and part 135 rotorcraft operators which are scheduled to take effect April 22, 2014. This final rule extends the effective date to April 22, 2015 to provide a sufficient amount of time for the affected operators and certificate holders to implement the new requirements. This action does not affect the provisions of the rule with a specific compliance date that are discussed later in this document.

II. Background

A. Statement of the Problem

There are approximately 5,465 rotorcraft pilots and 496 certificate holders conducting part 135 rotorcraft operations that are affected by the new requirements established in the February 21 rule. Moreover, all part 91 operations in class G airspace under visual flight rules will be affected by this rule. Multiple steps are required by the FAA and the regulated community for operators to implement the new requirements. However, it is not feasible for the FAA or rotorcraft operators to complete all the necessary steps by April 22, 2014. Consequently, operators will not be able to meet the operational requirements and thus will not be able to conduct part 135 operations or follow the new part 91 requirements beginning April 23, 2014. Therefore, the FAA is extending the rule's effective date to April 22, 2015 to provide a sufficient amount of time for the affected entities to complete all the necessary steps to implement the new requirements.

III. Discussion of Final Rule With Request for Comments

As stated above, the current effective date of the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule is April 22, 2014. Since the publication of the rule, it has become evident that this effective date does not allow certificate holders sufficient time to complete all the necessary steps to implement the new rule.

As one example, pilots are currently required to complete written or oral knowledge testing and a flight competency check every 12 calendar months. New § 135.293(a)(9) requires rotorcraft pilots to complete knowledge testing on "procedures for aircraft handling in flat-light, whiteout, and brownout conditions, including methods for recognizing and avoiding those conditions" during their next written or oral test after April 22, 2014. New § 135.293(c) requires rotorcraft pilots to complete "a demonstration of the pilot's ability to maneuver the rotorcraft solely by reference to instruments" during their next competency check after April 22, 2014.

In order to implement these new requirements, certificate holders must complete several steps, such as developing the procedures for testing aircraft handling in flat-light, whiteout, and brownout conditions, revising the approved training program to address the new requirements, and training instructors and check pilots prior to beginning the training, testing, and checking of rotorcraft pilots. The April 22, 2014 compliance date does not provide adequate time for certificate holders to complete these necessary steps and therefore the compliance date will be delayed to April 22, 2015. We note that this is the only provision requiring a specific change of rule text. In addition, we are revising the rule text to clarify the compliance date for this section.

In addition, the FAA has determined that the April 22, 2014 effective date does not provide sufficient time for the FAA or the regulated community to implement the other operational rules which are currently scheduled to take effect on that date. However, the FAA has determined that provisions with delayed compliance dates in the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule do not need to be extended under this action. This is because the FAA will have sufficient time to prepare guidance for regulated entities in advance of the compliance dates for these provisions. The FAA is not extending the compliance dates of the following provisions:

- 135.160, Radio altimeters for rotorcraft operations—compliance date April 24, 2017.
- 135.168, Emergency equipment: Overwater rotorcraft operations (406 MHz emergency locator transmitter)—compliance date April 24, 2017.
- 135.603, Pilot-in-command instrument qualifications—compliance date April 24, 2017.
- 135.605, Helicopter terrain awareness and warning system (HTAWS)—compliance date April 24, 2017.
- 135.607, Flight Data Monitoring System—compliance date April 23, 2018.
- 135.619, Operations control centers—compliance date April 22, 2016.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic

impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows.

The FAA is extending the effective date for the rules published in the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule on February 21, 2014 that are scheduled to take effect on April 22, 2014. The effective date of April 22, 2014 does not provide an adequate amount of time for the affected certificate holders to implement the new requirements. By extending the effective date to April 22, 2015, the affected certificate holders will have sufficient time to implement the new requirements.

The expected outcome will be cost relieving for certificate holders operating rotorcraft under part 135 and part 91 operators, and therefore a regulatory evaluation was not prepared. The FAA requests comments with supporting justification about the FAA determination of minimal impact.

The FAA has, therefore, determined that this final rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule does not impose any additional costs on affected entities. Therefore, as provided in section 605(b), the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will have only a domestic impact and therefore no effect on international trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $151 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this immediately adopted final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental

assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

H. Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the FAA, when modifying its regulations in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation, and to establish appropriate regulatory distinctions. As discussed in the Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations final rule which instituted the requirements being delayed by this action, the FAA finds that there is no need to make any regulatory distinctions in the provisions of this rule. *See* 79 FR 9932, 9971–72.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this immediately adopted final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule with request for comments under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a "significant energy action" under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document my be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/* or

3. Access the Government Printing Office's Web page at: *http://www.gpo.gov/fdsys/*.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

List of Subjects in 14 CFR Parts 91, 120, and 135

Air taxis, Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 1. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 41706, 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 44730, 45101–45105, Pub. L. 112–95, 126 Stat. 58 (49 U.S.C. 44730).

■ 2. Amend § 135.293 by removing the phrase "After the next scheduled competency check after April 22, 2014" from the beginning of paragraph (a)(9) and adding paragraph (h) to read as follows:

§ 135.293 Initial and recurrent pilot testing requirements.

* * * * *

(h) Rotorcraft pilots must be tested on the subjects in paragraph (a)(9) of this section when taking a written or oral knowledge test after April 22, 2015. Rotorcraft pilots must be checked on the maneuvers and procedures in paragraph (c) of this section when taking a competency check after April 22, 2015.

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC, on April 15, 2014.

Michael G. Whitaker,

Deputy Administrator, Federal Aviation Administration.

[FR Doc. 2014–09034 Filed 4–17–14; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 886

[Docket No. FDA–2013–N–0069]

Medical Devices; Ophthalmic Devices; Classification of the Eyelid Weight

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) is classifying the eyelid weight into class II (special controls). The Agency is exempting the external eyelid weight from premarket notification, but continuing to require premarket notification for implantable eyelid weights in order to provide a reasonable assurance of safety and effectiveness of the device. Both external and implantable eyelid weight devices are subject to special controls. The eyelid weight may be adhered to the outer skin of the upper eyelid (external eyelid weight) or implanted into the upper eyelid (implantable eyelid weight), and is intended for the gravity assisted treatment of lagophthalmos (incomplete eyelid closure).

DATES: *Effective Date:* July 21, 2014.

Compliance Dates: Premarket notification submissions (510(k)s) for

eyelid weights filed on or after the effective date of this rule are expected to comply with the requirement of special controls at the time that the 510(k) is submitted.

Premarket notification submissions (510(k)s) for eyelid weights filed before the effective date of this rule, but not yet cleared for marketing, are expected to comply with the requirement of special controls prior to receiving marketing clearance.

External eyelid weights exempt from premarket notification under this rule and not currently marketed are expected to comply with the requirement of special controls prior to introducing devices into interstate commerce.

Eyelid weights (both implantable and external) legally marketed before the effective date of this rule are expected to comply with the requirement of special controls by April 21, 2015. See section V of this document, "Compliance Dates," for further information.

FOR FURTHER INFORMATION CONTACT: Tina Kiang, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2414, Silver Spring, MD 20993–0002, 301–796–6860, *Tina.Kiang@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), and the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the FD&C Act, FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as "preamendments devices." FDA classifies these devices after the Agency takes the following steps: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

FDA refers to devices that were not in commercial distribution before May 28, 1976, as "postamendments devices." These devices are classified automatically by statute (section 513(f) of the FD&C Act) into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the FD&C Act, as amended by FDAMA; or (3) FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 of the regulations (21 CFR part 807).

A person may market a preamendments device that has been classified into class III through premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

Section 510(m) of the FD&C Act (21 U.S.C. 360(m)) provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the FD&C Act, if the Agency determines that premarket notification is not necessary to assure the safety and effectiveness of the device.

II. Regulatory History of the Device

In the **Federal Register** of February 8, 2013 (78 FR 9349), FDA proposed to classify eyelid weight devices intended for the gravity-assisted treatment of lagophthalmos (incomplete eyelid closure) into class II (special controls) and proposed special controls for these devices. FDA also proposed to exempt the devices from premarket notification requirements if the device is an external eyelid weight. FDA invited interested persons to comment on the proposed regulation by May 9, 2013. FDA received three comments on the proposed rule.

III. Summary of the Final Rule

In accordance with 21 CFR 860.84(g)(2), FDA is classifying eyelid weights into class II (special controls). FDA is codifying the classification of eyelid weights by adding § 886.5700.

A. External Eyelid Weights

Under section 510(m) of the FD&C Act, FDA has determined that premarket notification is not necessary to assure the safety and effectiveness of external eyelid weights, and the Agency is exempting these devices from premarket notification requirements. The Agency has also identified special controls for these devices. On or before the effective date of this final rule, firms who wish to market external eyelid weight devices that are not already legally marketed are required to either (1) comply with the particular mitigation measures set forth in the special controls in § 886.5700(b)(1) or (2) use alternative mitigation measures, but demonstrate to the Agency's satisfaction that those alternative measures identified by the firm will provide at least an equivalent assurance of safety and effectiveness. As discussed in sections IV and V, in response to comments regarding compliance with the special controls for existing legally marketed devices, FDA has extended the compliance date for special controls to 1 year from the effective date of this rule to allow manufacturers of existing legally marketed devices adequate time to review the design history files and complete any needed testing and implement any required labeling changes for their devices.

FDA also made changes to the final rule as related to external eyelid weights in response to the comments and for clarification. Proposed § 886.5700(b)(1)(iii) has been edited to remove the words "required for the safe and effective use of the device as outlined in § 801.109(c) of this chapter" to minimize any confusion since this section describes special controls and the labeling requirements in 21 CFR part 801 are a general control. FDA also removed the special controls for external eyelid weights related to magnetic resonance (MR) compatibility testing (see additional discussion in section IV).

B. Implantable Eyelid Weights

FDA has determined that premarket notification is necessary to provide

reasonable assurance of safety and effectiveness of implantable eyelid weights, and, therefore, this device type is not exempt from premarket notification requirements. The Agency has also identified special controls for these devices. On or before the effective date of this final rule, firms who wish to market external eyelid weight devices that are not already legally marketed are required to either (1) comply with the particular mitigation measures set forth in the special controls in § 886.5700(b)(2) or (2) use alternative mitigation measures, but demonstrate to the Agency's satisfaction that those alternative measures identified by the firm will provide at least an equivalent assurance of safety and effectiveness. As discussed in section IV, in response to comments regarding compliance with the special controls for existing legally marketed devices, FDA has extended the compliance date for special controls to 1 year from the effective date of this rule to allow manufacturers of existing legally marketed devices adequate time to review the design history files and complete any needed testing and implement any required labeling changes for their devices.

IV. Analysis of Comments and FDA's Response

FDA received three comments on the proposed rule. One of the comments was supportive of FDA's proposed rule, including the classification and the special controls for both the external and implantable eyelid weights and the exemption of external eyelid weights from premarket notification requirements (510(k)). A second comment agreed with the proposed classification into class II, but indicated that the risks associated with long-term use of external eyelid weights were similar to those for implantable eyelid weights, and that as such external eyelid weights should not be exempted from the premarket notification requirements. FDA disagrees with the comment. FDA believes that the identified special controls adequately mitigate the risks to health for the device regardless of the duration of use. The increased risks associated with implanted eyelid weights are related to the need for the device to be provided sterile and the increased biocompatibility requirements. These risks are significantly reduced with external eyelid weight devices. FDA believes that compliance with the special controls in § 886.5700(b)(1) provides a reasonable assurance of safety and effectiveness for external eyelid weight devices without the need for premarket notification.

The third comment requested clarification on whether existing eyelid weight manufacturers (for both implantable and external eyelid weight devices) need to address the identified special controls. The special controls established in this rule apply to existing legally marketed devices, as well as to new eyelid weight devices not currently marketed for which marketing authority is sought and to any modification of a currently legally marketed eyelid weight. In response to this comment, FDA has extended the compliance date for special controls for manufacturers of existing legally marketed devices to 1 year from the effective date of this rule, as outlined in section V, "Compliance Dates."

Submission of a new 510(k) solely to demonstrate conformance to the special controls is not needed unless complying with the special controls leads to changes to the device that would independently trigger the need for a new 510(k) under § 807.81(a)(3). However, manufacturers should maintain documentation in their design history file (see § 820.30 (21 CFR 820.30)) to demonstrate that they meet the special controls. To ensure that manufacturers of existing legally marketed devices have adequate time to review their design history files and complete any needed testing and implement any required labeling changes for their devices, FDA has extended the compliance date for existing legally marketed devices to comply with the special controls to 1 year after the effective date of this final rule. Manufacturers with questions regarding their existing devices are encouraged to interact with FDA via the pre-submission process.

The third comment further suggested that the biocompatibility testing requirements as described in the proposed special controls are more extensive and burdensome than the requirements under which existing legally marketed eyelid weights devices were originally reviewed. The comment stated that, for external eyelid weights, limited biocompatibility testing with supportive literature review and reference to material in predicate devices should be acceptable in lieu of a full battery of biocompatibility testing. FDA agrees that based on the material and manufacturing processes being used, a full battery of biocompatibility testing may not be required. Discussion of the specific biocompatibility testing requirements for existing legally marketed eyelid weight devices is beyond the scope of this rule; however, FDA encourages manufacturers to review existing Agency guidance on this topic and contact FDA via the pre-submission process to discuss specific biocompatibility requirements for their devices.

The third comment further requested clarification on whether a labeling change to address MR compatibility would trigger additional compliance expectations regarding MR testing and suggested that because external eyelid weights are removable devices, MR compatibility should not be a requirement for these devices. FDA agrees with the commenter that removal of the device when the patient is in the MR environment would mitigate this risk and has thus removed MR testing compatibility testing as a special control. However, to ensure that the patient is aware that the device should be removed in these circumstances, the special control regarding labeling has been revised to include a requirement for a warning stating that the patient should be instructed to remove the device prior to entering an MR environment.

Finally, the third comment also requested clarification on the special control for implanted eyelid weights: "testing demonstrating the sterility and shelf life of the device" and suggested that the shelf life of the implanted device is limited by the ability of the associated packaging to maintain a protective barrier and not by the device itself, and therefore, validated packaging and sterilization procedures would satisfy this requirement. Although FDA agrees that validation of the packaging and sterilization processes is important to comply with this special control, each manufacturer must assess the materials and processes used to manufacture their device when determining the testing necessary to provide assurance that the sterility and functionality of the device are maintained over its shelf life.

V. Compliance Dates

This final rule will become effective July 21, 2014.

The special controls established in this rule for external eyelid weights and the special controls established in this rule for implantable eyelid weights apply to any external or implantable eyelid weight respectively, whether the device is an existing legally marketed device, a new eyelid weight device not currently marketed for which marketing authority is sought, or a modification of a currently legally marketed eyelid weight. Devices of this type that were legally marketed before the effective date of this rule may continue to be legally marketed; however 1 year after the effective date of this rule, such

devices must comply with applicable special controls in order to continue to be legally marketed. Submission of a new 510(k) solely to demonstrate conformance to the special controls is not needed unless complying with the special controls leads to changes to the device that would independently trigger the need for a new 510(k) under § 807.81(a)(3). However, manufacturers should maintain documentation in their design history file (see § 820.30(j)) to demonstrate that they meet the special controls. One year after the effective date of this rule, any external eyelid weight that does not comply with the special controls established in § 886.5700(b)(1) or implantable eyelid weight that does not comply with the special controls established in § 886.5700(b)(2) this rule will be considered adulterated and misbranded (sections 501(f)(1)(B) and 502(o) of the FD&C Act (21 U.S.C. 351(f)(1)(B) and 352(o)) until such time as the device: (1) Complies with the special controls and any premarket notification requirements; (2) is approved in a PMA application; or (3) is classified into class I or II under section 513(f)(2) or (3) of the FD&C Act.

A 510(k) submission for an eyelid weight either filed before the effective date of this rule, but not yet cleared for marketing or filed after the effective date of this rule may be cleared for marketing only if the device complies with the special controls established for this device type. The submitter may demonstrate that the special controls have been met by incorporating previously submitted information by reference, or by providing newly generated information. A submitter's first 510(k) submission for an implantable eyelid weight filed following the publication of this final rule should be a traditional 510(k) submission. Filing of a special 510(k) submission for a modified implantable eyelid weight is only appropriate after FDA has cleared an initial 510(k) submission that establishes that the device complies with the special controls established for the device type.

VI. Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this final rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final regulation classifies a previously unclassified pre-amendment device type, there are only five registered establishments listed in the Establishment Registration and Device Listing database, and the regulation designating the classification of eyelid weights as class II is consistent with the historical regulatory oversight given to this device type, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $141 million, using the most current (2012) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

VIII. Paperwork Reduction Act of 1995

This final rule establishes special controls that refer to currently approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 886

Medical devices, Ophthalmic goods and services.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 886 is amended as follows:

PART 886—OPHTHALMIC DEVICES

■ 1. The authority citation for 21 CFR part 886 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Add § 886.5700 to subpart E to read as follows:

§ 886.5700 Eyelid weight.

(a) *Identification.* An eyelid weight is a prescription device made of gold, tantalum, platinum, iridium, or surgical grade stainless steel that is rectangular in shape and contoured to the shape of the eye. The device is intended for the gravity assisted treatment of lagophthalmos (incomplete eyelid closure).

(1) The external eyelid weight is adhered to the outer skin of the upper eyelid.

(2) The implantable eyelid weight is implanted into the upper eyelid.

(b) *Classification.* (1) Class II (special controls) for the external eyelid weight. The external eyelid weight is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 886.9. The special controls for the external eyelid weight are:

(i) Testing demonstrating the biocompatibility of the device; and

(ii) Labeling must include the following information:

(A) Specific instructions regarding the proper placement, sizing, and removal of the device; and

(B) A warning stating that the patient should be instructed to remove the device prior to entering a magnetic resonance environment.

(2) Class II (special controls) for the implantable eyelid weight. The special controls for the implantable eyelid weight are:

(i) Testing demonstrating the biocompatibility of the device;

(ii) Testing demonstrating the sterility and shelf life of the device;

(iii) Nonclinical testing evaluating the compatibility of the device in a magnetic resonance environment.

(iv) Patient labeling to convey information regarding the safety and compatibility of the device in a magnetic resonance environment, the conditions under which a patient with

the device can be safely scanned, and a mechanism for a healthcare provider to obtain detailed information about magnetic resonance safety and compatibility if needed.

Dated: April 15, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08940 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF STATE

22 CFR Part 173

[Public Notice 8703]

RIN 1400–AD50

Availability of Public Diplomacy Program Material Within the United States

AGENCY: Department of State.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of State ("Department") is amending its regulations to implement Section 1078 of the National Defense Authorization Act of 2013. This statutory provision, which entered into effect on July 2, 2013, amends previous law to allow the Department and the Broadcasting Board of Governors ("BBG") to make public diplomacy program material available within the United States, upon request, following the dissemination of such material abroad, and requires the Department to issue regulations implementing this change.

DATES: This interim final rule will become April 21, 2014. The Department will accept comments on the interim final rule from the public until June 20, 2014.

ADDRESSES: You may submit comments by any of the following methods:

- *Online:* Persons with access to the Internet may view this rule and provide comments by going to the regulations.gov Web site at: *http://www.regulations.gov.*
- *Mail (paper, disk, or CD–ROM submission):* Director, Office of Policy and Outreach, Bureau of International Information Programs, U.S. Department of State, State Annex 5 (SA–5), Floor 5, 2200 C Street NW., Washington, DC 20522–0505.
- *Email: IIP_Inquiries@state.gov.* You must include the RIN (1400–AD50) in the subject line of your message.

Inspection of Public Comments: All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business or financial information that is included in a comment. The Department of State will post all comments received before the close of the comment period at *http://www.regulations.gov.* You may search on the RIN for this rule, 1400–AD50.

FOR FURTHER INFORMATION CONTACT: Kim DeBlauw, Director, Office of Policy and Outreach, Bureau of International Information Programs, U.S. Department of State, SA–5, Floor 5, 2200 C Street NW., Washington, DC 20522–0505; phone: (202) 632–9938; fax (202) 632–9901.

SUPPLEMENTARY INFORMATION:

Executive Summary

Section 1078 of the National Defense Authorization Act for Fiscal Year 2013, Public Law 112–239 ("NDAA"), which entered into effect on July 2, 2013, amends and clarifies, respectively, section 501 of the United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1461; "the Smith-Mundt Act") ("Section 501"), governing the domestic distribution of certain information about the United States, its people, and policies ("Program Material") prepared for dissemination abroad; and section 208 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (22 U.S.C. 1461–1a) ("Section 208"), governing the creation of such material for the purpose of influencing domestic public opinion.

The revised Section 501 authorizes the use of public diplomacy funds for the preparation, dissemination and use of Program Material "intended for foreign audiences abroad." With respect to Program Material disseminated abroad on or after July 2, the Department and/or the BBG may, upon request, make such material available within the United States, and both the Department and BBG must issue necessary regulations to establish procedures to maintain such material, for reimbursement of reasonable costs incurred in fulfilling requests for such material, and to ensure that persons seeking the release of such material have secured and paid for necessary U.S. rights and licenses. (The BBG published its interim final rule on July 2, 2013, with a final rule published on November 8, 2013 (78 FR 67025).)

The mission of U.S. public diplomacy is to support the achievement of U.S. foreign policy goals and objectives, advance national interests, and enhance national security by informing and influencing foreign publics, and by expanding and strengthening the relationship between the people and Government of the United States and citizens of the rest of the world. Public diplomacy outreach includes communications with foreign audiences abroad through Program Material prepared with, and efforts supported by, funds appropriated or otherwise made available for this purpose. Prior to the 2013 NDAA, such material could not be disseminated within the United States but could be available at the Department following its release abroad, upon request, for examination only to limited categories of requesters (*i.e.,* representatives of U.S. press associations, newspapers, magazines; research students and scholars; Members of Congress).

Regulatory Analysis

Administrative Procedure Act

The Department is of the opinion that this rulemaking is exempt from the notice-and-comment provisions of 5 U.S.C. 553 under the good cause exception of 5 U.S.C. 553(b). There is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to have this rule effective at the time of publication. Because one of the purposes of this rule and the law underlying this rule is to allow information dissemination outside of the Freedom of Information Act for Program Material, and because of the already-past effective date of the law, the intent of the law would be frustrated if the Department could not begin implementing this rule and responding to domestic requests for Program Material as soon as possible. Accordingly, the Department finds that normal public rulemaking procedures are impracticable and unnecessary, and that there is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to exempt this rule from public rulemaking procedures and to implement this rule upon publication. Without prejudice to the Department's determination that there is good cause to exempt this rule from public rulemaking procedures, in the interests of transparency and public participation, the Department is publishing this rule as an interim final rule with a 60-day provision for public comment.

Furthermore, because this is a substantive rule that relieves restrictions imposed by previous versions of 22 U.S.C. 1461 and 1461–1a, the Department may implement this rule at the time of publication under 5 U.S.C. 553(d)(1). This rule does not require or prompt the public to take any action; rather, it functions to relieve the prohibition that prevented the Department from responding to requests

for Program Material from the U.S. public, U.S. media entities, or other U.S. organizations. This rule benefits the public, media, and other organizations by allowing them to request and access the Department's Program Material, which previously could not be disseminated within the United States.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking is not a major rule as defined by 5 U.S.C. 804 for the purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete in domestic and export markets.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Regulatory Flexibility Act/Executive Order 13272: Small Business

The Department hereby certifies that these regulatory changes will not have a significant impact upon small businesses.

Executive Order 13563 and Executive Order 12866

The Department is publishing this rulemaking in response to a statutory requirement that will make more information available to the public; therefore, the benefits of the rulemaking outweigh any costs. The Department does not consider this rulemaking to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, as amended by Executive Order 13563. The Department has reviewed this rulemaking to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders.

Executive Order 12988

The Department has reviewed this rulemaking in light of sections 3(a) and (b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Orders 12372 and 13132

This rulemaking will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. Executive Order 12372, regarding intergovernmental consultation on federal programs and activities, does not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking contains no new information collections subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 173

Broadcasting, Communications, Education, Foreign relations, Freedom of information, Information, Publications, Records, Radio.

Accordingly, 22 CFR chapter I, subchapter R, is amended by adding a new part 173 as follows:

PART 173—AVAILABILITY OF PUBLIC DIPLOMACY PROGRAM MATERIAL IN THE UNITED STATES

Sec.

173.1 Purpose and scope.
173.2 Definitions.
173.3 Availability of program material.
173.4 Terms of use and other compliance.
173.5 Fees.

Authority: the United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1461, *et seq.*); Section 1078 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112–239.

§ 173.1 Purpose and scope.

This part contains the rules that the Department follows for responding to requests for the release within the United States of public diplomacy program material generated pursuant to the U.S. Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1431, *et seq.*; "the Smith-Mundt Act"). It is the Department's policy to make its program material available on its public Web site or via third-party platforms whenever doing so is consistent with the Department's mission and all statutory authorities, prohibitions, contractual obligations, principles, and standards. Requests for program material that is not available on the Department's public Web site or via third-party platforms must be submitted under the Freedom of Information Act (the "FOIA") pursuant to the FOIA provisions of 22 CFR part 171, subpart B.

§ 173.2 Definitions.

For the purposes of this part,

(a) *Program material* shall mean information about the United States, its people and policies, intended for foreign audiences abroad, that the Department prepares or assists in preparing using public diplomacy funds and disseminates to foreign audiences outside of the United States pursuant to the Smith-Mundt Act and Section 208 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (22 U.S.C. 1461–1a), as amended. Program Material includes, but is not limited to, electronic journals, pamphlets, books, maps, posters, videos, presentations, photos, games, curricula and other teaching materials, and certain social media and web-based interactive technology content produced in Washington, DC, as well as such materials and content produced at U.S. embassies abroad.

(b) *Request* shall mean any attempt to access the Department's Program Material, including through the Department's public Web sites and third-party platforms, or through a direct inquiry to a Department official in connection with a speech or other engagement.

(c) *Requester* shall mean any private person or entity that requests that the Department make Program Material available within the United States.

§ 173.3 Availability of program material.

(a) The Department makes Program Material available to Requesters electronically through Department Web sites and/or various third-party platforms, where such material has been disseminated to audiences abroad. Once Program Material is published, it remains available in digital format until removed or archived by the Department at its discretion (*see* paragraph (c) of this

section). For access to such Program Material, Requesters may visit *www.state.gov/r.*

(b) As a general matter, Program Material published both electronically and in hard copy will be made available electronically through Department Web sites and/or various third-party platforms, although the Department reserves the right to make Program Material available in hard copy at its sole discretion. To the extent a Requester seeks Program Material that is not made available online through Department Web sites or third-party platforms, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR part 171, Subpart B.

(c) The Department will remove Program Material from Department and third-party Web sites when it deems such material no longer relevant to the Department's public diplomacy mission. The Department will also remove Program Material when required by licensing agreements with third-party copyright holders. To the extent a Requester seeks Program Material that has been removed for whatever reason, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR part 171, Subpart B.

(d) Once Program Material has been removed from the Department's Web site or third-party platforms, a determination will be made as to whether it is a permanent Department record under the Department's applicable Records Disposition Schedule ("RDS"). Permanent records will be transferred in their entirety to the National Archives and Records Administration ("NARA") according to the RDS; *see* 36 CFR 1256.98 for information about how to request Department Program Material that has been transferred to NARA. Material designated as "temporary" under the applicable RDS will be destroyed once it has been removed from the Department or third-party sites.

§ 173.4 Terms of use and other compliance.

Requesters and users of Department Web sites, or third-party Web sites containing Program Material, are responsible for complying with the Terms of Use applicable to any such site. Requesters are also solely responsible for complying with any applicable statutes governing the use of such material and securing appropriate licenses for use of such material, if required.

§ 173.5 Fees.

(a) The Department will make Program Material available online (*i.e.,* in digital format) at no cost.

(b) The Department may collect a fee for reimbursement of the reasonable costs incurred to fulfill requests for Program Material not available online. Such requests, including fees applicable thereto, shall be governed by part 171, subpart B of this subchapter.

Dated April 14, 2014.

Richard Stengel,

Under Secretary for Public Diplomacy and Public Affairs.

[FR Doc. 2014-09022 Filed 4-18-14; 8:45 am]

BILLING CODE 4710-11-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1917

[Docket ID: OSHA–2012–0028]

RIN 1218–AC72

Vertical Tandem Lifts

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule; remand.

SUMMARY: OSHA is implementing a court-ordered remand of certain portions of the standard for vertical tandem lifts (VTLs). This final rule implements the remand by: Limiting the application of the corner-casting and interbox-connector inspection requirements to shore-to-ship VTLs; and removing the tandem lifts of platform containers from the scope of the VTL standard.

DATES: The final rule becomes effective on July 21, 2014.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Joseph Woodward, the Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S4004, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999; email: *Meilinger.francis2@dol.gov.*

Technical Information: Mrs. Amy Wangdahl, Director, Office of Maritime and Agriculture, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2086 or email *wangdahl.amy@dol.gov.*

SUPPLEMENTARY INFORMATION:

Copies of this Federal Register notice: Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available at OSHA's Web site at *http://www.osha.gov.*

Since the 1970s, intermodalism (the containerization of cargo) has become the dominant mode of cargo transport in the maritime industry, replacing centuries-old, break-bulk cargo handling. In the marine cargo handling industry, intermodalism typically involves three key components: Standardized containers with uniform corner castings; interbox connectors (such as semiautomatic twistlocks) to secure the containers (to each other at the four corners, to the deck of the ship, to a railroad car, or to a truck chassis); and a type of crane called a container gantry crane that has specialized features for rapid loading and unloading of containers. Because intermodalism is highly dependent on standardized containers and connecting gear, several international organizations have developed standards for equipment and practices to facilitate intermodal freight operations. This helps ensure that containers and interbox connectors are sized and operate properly so that containers and connectors from different manufacturers will fit together.

On a ship, containers above deck are secured, by interbox connectors, to each other and to the deck of the ship. In the conventional loading and unloading process, the container gantry crane lifts one container (either 6.1 or 12.2 meters long) at a time, using the crane's specially developed spreader beam. A VTL is the practice of a container crane lifting two or more intermodal containers, one on top of the other, connected by a particular type of interbox connector, known as a semiautomatic twistlock.

On December 10, 2008, OSHA published a final rule [73 FR 75245] adopting new requirements relating to VTLs (73 FR 75246). The final standard permitted VTLs of no more than two empty containers provided that certain safeguards are followed. The final rule required, among other safeguards, inspections of each container, interbox connector, and corner casting immediately before use in a VTL (29

CFR 1917.71(i)(9)). The final rule also prohibited lifting platform containers as part of a VTL unit (29 CFR 1917.71(i)(10)).

The National Maritime Safety Association (NMSA), a trade association representing marine terminal operators, petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the VTL standard, arguing, in part, that two of the Standard's requirements—the interbox connector inspection requirement in § 1917.71(i)(9) and the ban on VTLs of platform containers in § 1917.71(i)(10)—were not technologically feasible.[1] The Court found that there was insufficient evidence supporting OSHA's determination of technological feasibility with respect to those two provisions. Accordingly, the Court vacated and remanded the inspection requirement at § 1917.71(i)(9), as applied to ship-to-shore VTLs, and the total ban on platform container VTLs at § 1917.71(i)(10). *National Maritime Safety Ass'n* v. *OSHA*, 649 F.3d 743, 753–54 (DC. Cir. 2011).

OSHA is revising § 1917.71 to effectuate the Court's ruling. First, the Agency is removing paragraph (i)(10) of that section which prohibited the lifting of platform containers as part of a VTL. In addition, it is revising the scope of the VTL standard in the introductory text to paragraph (i) of that section to make clear that vertical tandem lifts of platform containers are not covered. Neither the proposed nor the final rule contemplated that platform containers would be covered under the requirements included in paragraph (i), and there is nothing in the Court's decision indicating that it intended such a result. Consequently, OSHA believes that the only reasonable way to implement the Court's decision vacating the provision banning VTLs of platform containers is to exempt VTLs of such containers from the scope of § 1917.71(i) in addition to removing existing § 1917.71(i)(10).

Second, OSHA is adding a new paragraph in § 1917.71(i)(9) to make the inspection requirements in § 1917.71(i)(9) inapplicable to ship to shore VTLs. The addition, which appears in paragraph (i)(9)(vii), states that the requirements of paragraph (i)(9) of § 1917.71 do not apply to ship-to-shore VTLs.

For the hazards addressed by the portions of the VTL standard vacated by the DC Circuit, OSHA is reverting to its prior interpretative positions. For inspections of ship-to-shore VTLs, OSHA's position is set forth in the September 2, 1993 letter from Roy Gurnham to Michael Bohlman (the "Gurnham letter"), which indicates that:

> The containers must be inspected for visible defects prior to hoisting and damaged containers shall not be hoisted in tandem. Ref.-29 C.F.R. 1918.85(d).

(R. Doc. #OSHA–S025A–2006–0658–0003.) Any other requirements referenced in the Gurnham letter that are not required by an applicable standard are superceded by the VTL standard.

For the hazards arising from lifts of multiple platform (flatrack) containers, the letter of January 16, 2004 from Richard E. Fairfax to Larry Hansen applies. That letter states that:

> When connected by semi-automatic twistlocks (i.e., liftlocks that are not built-in), only two empty flatrack containers with their end frames folded may be lifted as a vertical tandem lift (VTL). When connected with internal mechanisms (i.e., built-in connectors that are designed for lifting), the number of empty flatrack containers with their end frames folded that may be lifted cannot exceed the manufacturers' recommendations. Empty flatrack containers with their end frames in the upright position are not allowed to be lifted as a VTL because of strength and stability considerations. The provisions listed in the [Gurnham letter] apply to VTL lifts of two empty containers connected by semi-automatic twistlocks. Although the Gurnham letter does not specifically mention VTL lifts of flatrack containers, OSHA concluded that the provisions listed in the letter also apply to VTL lifts of two empty flatrack containers with their end frames folded and connected by semi-automatic twistlocks.

(R. Doc. #OSHA–S025A–2006–0658 0183.)

Final Economic Analysis and Regulatory Flexibility Act Certification

The Agency concludes that the revisions will not impose any additional costs on employers as it merely implements the order of the Court remanding two provisions of the VTL standard at § 1917.71(i). As a result of the Court's action, employers have not needed to comply with the inspection requirements in § 1917.71(i)(9), with respect to ship to shore VTLs, or with the ban on VTLs of platform containers in § 1917.71(i)(10). By removing workplace requirements, the Court's decision reduces rather than increases compliance costs. This final rule simply codifies the Court's action. Therefore, the final rule does not impose significant additional costs on any private-sector or public-sector entity and does not meet any of the criteria for a significant rule specified by Executive Order 12866 or 13563. Because this final rule has no significant additional costs, OSHA certifies that it will not have a significant economic impact on a substantial number of small entities. Accordingly, the Agency is not preparing a regulatory flexibility analysis under the Regulatory Flexibility Act. See 5 U.S.C. 605. In addition, the requirements of the Regulatory Flexibility Act do not apply because a general notice of proposed rulemaking was not published for this final rule. See 5 U.S.C. 601(2). Likewise, the rule is not a "major rule" for purposes of the Congressional Review Act. *See* 5 U.S.C. 804.

Federalism

OSHA reviewed this final rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, Aug. 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope.

Section 18 of the Occupational Safety and Health Act of 1970 (the OSH Act; U.S.C. 651 *et seq.*) allows States to adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards; OSHA refers to States that obtain Federal approval for such a plan as "State Plan States" (29 U.S.C. 667). Occupational safety and health standards developed by State Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Subject to these requirements, State Plan States are free to develop and enforce their own requirements for occupational safety and health standards. Section 18(c)(2) of the OSH Act permits State Plan States and Territories to develop and enforce their own standards for VTL operations provided they are at least as effective in providing safe and healthful employment and places of employment as the requirements specified in this final rule.

In summary, this final rule complies with Executive Order 13132. In States without OSHA-approved State Plans, this final rule would limit State policy

[1] NMSA also argued that (1) OSHA failed to demonstrate that VTLs pose a significant risk to worker safety; (2) the Standard was not reasonably necessary or appropriate in light of the safe work zone requirement; (3) OSHA's authority is limited to requiring, not prohibiting, workplace practices; and (4) if the standard is otherwise valid, in granting OSHA standard-setting authority under the Occupational Safety and Health Act (29 U.S.C. 651 678) Congress unconstitutionally delegated its legislative power to the executive branch. However, the Court denied those parts of NMSA's petition.

options in the same manner as every standard promulgated by OSHA. In States with OSHA-approved State Plans, this rulemaking would not significantly limit State policy options.

State Plan States

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, the 27 States or U.S. Territories with their own OSHA-approved occupational safety and health plans must amend their standards to reflect the new standard or amendment or show OSHA why such action is unnecessary (by showing, for example, that an existing State standard covering this area is already "at least as effective" as the new Federal standard or amendment). (See 29 CFR 1953.5(a).) The State standard must be "at least as effective" as the final Federal rule and must be adopted within 6 months of the publication date of the final Federal rule (29 CFR 1953.5(a)). When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than the existing standard, as is the case in this final rule, State Plan States are not required to amend their standards, although OSHA may encourage them to do so.

The 27 States and territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, Illinois, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only.

Unfunded Mandates Reform Act of 1995

OSHA reviewed this final rule in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (58 FR 58093 (Oct. 28, 1993)). As discussed earlier in this notice, the Agency determined that this final rule will not impose additional costs on any private sector or public sector entity. Accordingly, this final rule requires no additional expenditures by either public or private employers.

Further, as noted earlier in this notice, the Agency's standards do not apply to State and local governments except in States that have elected voluntarily to adopt a State Plan approved by the Agency. Consequently, this final rule does not meet the definition of a "Federal intergovernmental mandate" (see Section 421(5) of the Unfunded Mandates Reform Act (2 U.S.C. 658(5)). Therefore, for the purposes of the Unfunded Mandates Reform Act, the Agency certifies that this final rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than $100 million in any year. In addition, the requirements of UMRA do not apply because a general notice of proposed rulemaking was not published for this final rule. See 2 U.S.C. 1532(a).

List of Subjects in 29 CFR Part 1917

Freight, Longshore and harbor workers, Occupational safety and health.

Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210. It is issued pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970, Public Law 91–596, 84 Stat. 1590 (29 U.S.C. 653, 655, 657), section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), the judgment of the court in *National Maritime Safety Association* v. *OSHA*, 649 F.3d 743 (D.C. Cir. 2011), and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC on April 8, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, 29 CFR part 1917 is amended as follows:

PART 1917—MARINE TERMINALS

■ 1. The authority citation for part 1917 is revised to read as follows:

Authority: 33 U.S.C. 941; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912), as applicable, and 29 CFR part 1911.

Section 1917.28 also issued under 5 U.S.C. 553.

Section 1917.29 also issued under 40 U.S.C. 1801–1819 and 5 U.S.C. 553.

■ 2. Section 1917.71 is amended by revising paragraph (i) introductory text, adding paragraph (i)(9)(vii), and removing paragraph (i)(10) to read as follows:

§ 1917.71 Terminals handling intermodal containers or roll-on roll-off operations.

* * * * *

(i) *Vertical tandem lifts.* The following requirements apply to operations involving the lifting of two or more intermodal containers by the top container (vertical tandem lifts or VTLs). These requirements do not apply to operations involving the lifting of two or more interconnected platform containers.

* * * * *

(9) * * *

(vii) The requirements of paragraph (i)(9) of this section do not apply to ship-to-shore VTLs.

* * * * *

[FR Doc. 2014–08725 Filed 4–18–14; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2014–0153]

RIN 1625–AA00

Safety Zone; Lucas Oil Drag Boat Racing Series; Thompson Bay, Lake Havasu City, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone within the navigable waters of Thompson Bay in Lake Havasu City, Arizona in support of the Lucas Oil Drag Boat Racing Series high speed drag boat race. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 7 a.m. to 7 p.m. on May 2, 2014 through May 4, 2014.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2014–0153]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the

Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Giacomo Terrizzi, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7656, email *d11marineeventssandiego@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because an NPRM would be impracticable. Logistical details did not present the Coast Guard enough time to draft, publish, and receive public comment on an NPRM. As such, the event would occur before the rulemaking process was complete. Immediate action is needed to help protect the safety of the participants, crew, spectators, and participating vessels from other vessels during this three day event.

Under 5 U.S.C. 553(d)(3), for the same reasons mentioned above, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this rule would be contrary to the public interest, because immediate action is necessary to protect the safety of the participates from the dangers associated with other vessels transiting this area while the race occurs.

B. Basis and Purpose

The legal basis and authorities for this rule are found in 33 U.S.C. 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory safety zones. The I–10 Race Promotions is sponsoring the Lucas Oil Drag Boat Racing Series, which will involve 150 drag boats, 10 to 50 feet in length from across the United States and Canada. The safety zone will cover the majority of Thompson Bay. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, other vessels, and users of the waterway.

C. Discussion of the Final Rule

The Coast Guard is establishing a safety zone that will be enforced from 7 a.m. to 7 p.m. on May 2, 2014 through May 4, 2014. The limits of the safety zone will include all the navigable waters of Thompson Bay encompassed by drawing a line from point to point along the following coordinates:

Northern Zone line:

34°27′57.96″ N, 114°20′48.49″ W
34°27′57.71″ N, 114°20′49.75″ W

North West Zone Line:

34°27′07.99″ N, 114°21′09.93″ W
34°26′51.99″ N, 114°21′03.83″ W

South Zone Line:

34°27′07.99″ N, 114°21′09.93″ W
34°26′51.99″ N, 114°21′03.83″ W

The safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway. Persons and vessels will be prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative. The three day event will include official racing on Friday, Saturday and Sunday. Before the effective period, the Coast Guard will publish a local notice to mariners (LNM).

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the size, location, and the limited duration of the safety zone. Additionally, to the maximum extent practicable, the event sponsor will assist with boaters wishing to transit the racing area during non-racing times throughout the three days.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the impacted portion of Lake Havasu from 7 a.m. to 7 p.m. on May 2, 2014 through May 4, 2014.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone would apply to the majority of Thompson Bay, traffic would be allowed to pass through the zone with the permission of the Captain of the Port, or his designated representative. The event sponsor will also to their maximum extent assist boaters wishing to transit the racing area during non-racing times throughout the three days. Before the effective period, the Coast Guard will publish a Local Notice to Mariners.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental

jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a safety zone on the navigable waters of Lake Havasu. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under ADDRESSES. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security Measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–625 to read as follows:

§ 165.T11–625 Safety zone; Lucas Oil Drag Boat Racing Series; Thompson Bay, Lake Havasu City, AZ

(a) *Location.* The limits of the safety zone will include all the navigable waters of Thompson Bay encompassed by drawing a line from point to point along the following coordinates:

(1) *Northern Zone line:*

(i) 34° 27′ 57.96″ N, 114° 20′ 48.49″ W

(ii) 34° 27′ 57.71″ N, 114° 20′ 49.75″ W

(2) *North West Zone Line:*

(i) 34° 27′ 07.99″ N, 114° 21′ 09.93″ W

(ii) 34° 26′ 51.99″ N, 114° 21′ 03.83″ W

(3) *South Zone Line:*

(i) 34° 27′ 07.99″ N, 114° 21′ 09.93″ W

(ii) 34° 26′ 51.99″ N, 114° 21′ 03.83″ W

(b) *Enforcement Period.* This section will be enforced on May 2, 2014 through May 4, 2014. It will be enforced from 7 a.m. to 7 p.m. each day (May 2, 3, and 4, 2014).

(c) *Definitions.* The following definition applies to this section: *designated representative,* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, or local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(3) Upon being hailed by U.S. Coast Guard or designated patrol personnel by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(4) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: March 20, 2014.

S.M. Mahoney,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2014–08028 Filed 4–18–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2014–0140]

RIN 1625–AA00

Safety Zone; BWRC West Coast Nationals; Parker, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone within the Lake Moolvalya region of the navigable waters of the Colorado River in Parker, Arizona in support of the Blue Water Resort and Casino (BWRC) West Coast Nationals high speed boat race. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 6 a.m. to 6 p.m. on May 3 and May 4, 2014.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2014–0140]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Giacomo Terrizzi, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7656, email *dlLmarineventssandiego@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule
BWRC Blue Water Resort and Casino
NOE Notice of Enforcement
SLR Special Local Regulation

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because an NPRM would be impracticable. Logistical details did not present the Coast Guard enough time to draft, publish, and receive public comment on an NPRM. As such, the event would occur before the rulemaking process was complete. Immediate action is needed to help protect the safety of the participants, crew, spectators, and participating vessels from other vessels during this two day event.

Under 5 U.S.C. 553(d)(3), for the same reasons mentioned above, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this rule would be contrary to the public interest, because immediate action is necessary to protect the safety of the participants from the dangers associated with other vessels transiting this area while the race occurs.

B. Basis and Purpose

The legal basis and authorities for this rule are found in 33 U.S.C. 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory safety zones. RPM Racing Enterprises is sponsoring the BWRC West Coast Nationals, which will involve 100 power boats, 8 to 16 feet in length. These power boats will be transiting a portion of Moovalya Lake on the Colorado River in Parker, AZ. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, other vessels, and users of the waterway.

C. Discussion of the Final Rule

The Coast Guard is establishing a safety zone that will be enforced from 6 a.m. to 6 p.m. on May 3 and May 4, 2014. The limits of the safety zone will include all the navigable waters of the Colorado River between Headgate Dam and 0.5 miles north of the Blue Water Marina in Parker, Arizona. The safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway. Persons and vessels will be prohibited from entering into, transiting through, or anchoring with this safety zone unless authorized by the Captain of the Port, or his designated representative.

BWRC West Coast Nationals is listed as a recurring event in Title 33 Code of Federal Regulations (CFR), Part 100.1102, Table 1 (Item 8) on a Saturday and Sunday in April. Because the event falls on the first weekend in May, a Marine Event Special Local Regulations (SLR) Notice of Enforcement (NOE) is not sufficient. A temporary final rule published in the **Federal Register** will provide visibility to the established safety zone. Before the effective period, the Coast Guard will also publish a local notice to mariners (LNM).

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of

potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the size, location, and the limited duration of the safety zone. Additionally, to the maximum extent practicable, the event sponsor will assist with boaters wishing to transit the racing area during non racing times throughout the two days.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the impacted portion of the Colorado River from 6 a.m. to 6 p.m. on May 3 and May 4, 2014.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone would apply to the entire width of the river, traffic would be allowed to pass through the zone with the permission of the Captain of the Port, or his designated representative. The event sponsor will also to their maximum extent assist boaters wishing to transit the racing area during non-racing times throughout the two days. Before the effective period, the Coast Guard will publish a Local Notice to Mariners.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a "significant energy action" under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a safety zone on the navigable waters of Moovalya Lake. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the

docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security Measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

■ 2. Add § 165.T11–626 to read as follows:

§ 165.T11–626 Safety zone; BWRC West Coast Nationals, Parker, AZ.

(a) *Location.* The limits of the safety zone will include all the navigable waters of the Colorado River on Moovalya Lake between Headgate Dam and 0.5 miles north of the Blue Water Marina in Parker, Arizona.

(b) *Enforcement Period.* This section will be enforced on May 3 and May 4, 2014. It will be enforced from 6 a.m. to 6 p.m.

(c) *Definitions.* The following definition applies to this section: *designated representative,* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, or local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) In accordance with general regulations in 33 CFR part 165, subpart C, entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Captain of the Port designated representative or event sponsor.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(4) Upon being hailed by U.S. Coast Guard or designated patrol personnel by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: March 20, 2014.

S.M. Mahoney,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2014–08933 Filed 4–18–14; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 961

Rules of Practice in Proceedings Under Section 5 of the Debt Collection Act

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This document contains the final revisions to the rules of practice before the Judicial Officer in proceedings under section 5 of the Debt Collection Act. These rules of procedure completely replace and supersede the prior rules.

DATES: *Effective Date:* June 2, 2014.

FOR FURTHER INFORMATION CONTACT: Associate Judicial Officer Gary E. Shapiro, (703) 812–1910.

SUPPLEMENTARY INFORMATION: On February 18, 2014, the Judicial Officer Department published for comment proposed revisions to the rules governing practice in proceedings under section 5 of the Debt Collection Act of 1982 (79 FR 9120–21). Following the receipt of comments, the Judicial Officer has made further revisions to the original proposed rules, as discussed below, and has determined that it is appropriate to adopt the rules of practice, as revised. The Judicial Officer Department also has determined that it is appropriate to make these rules of practice effective on June 2, 2014, in the interest of orderly public administration.

A. Executive Summary

Part 961 of title 39, Code of Federal Regulations, contains the rules of practice in proceedings under section 5 of the Debt Collection Act of 1982, as amended, 5 U.S.C. 5514, in which the Judicial Officer or an assigned Hearing Official provides the final agency adjudication for debt collection assessments by administrative salary offset issued by the Postal Service seeking to collect a debt owed it by a current employee. This authority is delegated by the Postmaster General. Although these rules provide a complete replacement for the former rules, the changes are not considered to affect the rights of the parties in a substantive way. Rather, the rules are revised to conform to current practices and to clarify the procedures.

B. Background

The Judicial Officer Department published for comments proposed revisions to the rules governing proceedings under section 5 of the Debt Collection Act of 1982 in the **Federal Register** on February 18, 2014 (79 FR 9120–21). This notice announces the intention to promulgate final rules of procedure, following our review and consideration of all comments. The period for comments closed on March 20, 2014. We considered all comments received, revised the proposed rules as explained below, and promulgate our final rules of procedure.

C. Summary of Comments and Changes

The Judicial Officer Department received comments from one source: a labor union representing many Postal Service employees who are parties to Debt Collection Act litigation before the Judicial Officer Department. We carefully considered each comment and adopted some of the suggestions made. All comments are discussed below:

Section 961.4 Employee Petition for a Hearing

A comment noted that the proposed rule provided the Hearing Official with discretion to resolve a dispute where the Postal Service has not initiated involuntary administrative salary offsets by issuing a Notice as required by the Debt Collection Act. This rule change reflects our experience that the Postal Service sometimes collects alleged debts by administrative salary offset without having issued the proper Notice. In such circumstances, our practice has been to order a refund of the improperly collected offset, and to offer the employee the choice whether to proceed to an adjudication on the merits without additional procedural requirements, or to dismiss the case without prejudice (or sometimes suspend the case) while requiring the Postal Service to issue the Notice. Retaining the case ensures that the employee remains protected against collection activity without undue delay of the adjudication. As explained however, at the option of the employee, we will dismiss the case as premature, or suspend it, and require that the Notice be issued. In either event, we will not permit collection activity to commence until our adjudication is final or the Postal Service has complied with the statute. As we believe that the revision is consistent with the statute, protects the rights of the employee/

debtor, and conforms the rule to existing practice, we have declined to make a change in response to the comment.

Another comment expressed concern about the proposed elimination of former paragraphs (b)(4) and (5) from § 961.4. Deleted paragraph (b)(4) provided for an employee to include in his or her petition whether an oral hearing is requested, or alternatively, a hearing based solely on written submissions. Deleted paragraph (b)(5) provided for an employee requesting an oral hearing to include a statement of the evidence he or she will produce which makes an oral hearing necessary, including a list of witnesses, with their addresses, whom the employee expects to call; the proposed city for the hearing site, with justification for holding the hearing in that city; and recommended alternative dates for the hearing; which should be within 40 days from filing the Petition. These deletions are part of several former requirements for inclusion in an employee petition. Our objective was to simplify petition requirements and defer obtaining certain information from an employee until a later stage of the proceeding when the case is developed further. The requirements cited in the comment were deleted because at the petition stage, it often is premature to include such information resulting in incomplete petitions which unnecessarily delays the process. Both parties are given opportunities to express their preferences concerning the type of hearing requested which the Hearing Official will consider in deciding the most appropriate form for a hearing. We agree with the comment that the employee should be permitted to present arguments in support of his or her position regarding whether an oral or written hearing should occur. While that reflects our existing process, we have modified the language of the rules to make it explicit, and have done so in the most appropriate paragraph—§ 961.8(d), which has been changed to require the Hearing Official to consider the positions of the parties before determining whether an oral hearing (or alternatively, a hearing solely on written submissions) shall be conducted, and setting the place, date, and time for such a hearing. Where a hearing on written submissions is ordered, the Hearing Official explains the process thoroughly to both parties. Therefore, an additional change in that regard is not necessary.

Section 961.8 Hearing Official Authority and Responsibilities

A comment expressed concern about the proposed elimination of the following sentence from § 961.8: "The proceedings must be expedited to ensure issuance of the final decision no later than 60 days after the filing of the employee's hearing Petition." Our case law precedent establishes that the sixty-day timeframe referenced in the prior regulations and in the Debt Collection Act is not a statutory deadline or requirement that can be enforced by a party. *See Celeste Guice,* P.S. Docket No. DCA 12–19 (May 11, 2012). Additionally, our experience has been that both parties commonly request extensions or do not comply with deadlines in these cases making decisions within sixty days impossible. While the Judicial Officer Department's policy is to issue decisions in a timely manner after the record closes, a specific hard deadline is not practical. Furthermore, employees who have filed timely petitions remain protected against involuntary administrative salary offsets until the case is decided. Therefore, we do not believe that re-insertion of a sixty-day time period is necessary, nor does it reflect our case law or actual practice. However, to address the concern reflected in this comment, we have added language to § 961.8(i) to require the Hearing Official to issue the decision as soon as practicable after the close of the record, and to stay collection activity until the decision has issued.

D. Effective Date

These revised rules will govern proceedings under part 961 docketed on or after June 2, 2014.

List of Subjects in 39 CFR Part 961

Claims, Government employees, Wages.

For the reasons stated in the preamble, the Postal Service hereby revises 39 CFR part 961 as set forth below:

PART 961—RULES OF PRACTICE IN PROCEEDINGS UNDER SECTION 5 OF THE DEBT COLLECTION ACT

Sec.

961.1 Authority for rules.
961.2 Scope of rules.
961.3 Definitions.
961.4 Employee petition for a hearing.
961.5 Effect of filing a petition.
961.6 Filing, docketing, and serving documents; computation of time; representation of parties.
961.7 Answer to petition.
961.8 Hearing Official authority and responsibilities.
961.9 Opportunity for oral hearing.
961.10 Effect of Hearing Official's decision; motion for reconsideration.
961.11 Consequences for failure to comply with rules.
961.12 Ex parte communications.

Authority: 39 U.S.C. 204, 401; 5 U.S.C. 5514.

§ 961.1 Authority for rules.

These rules are issued by the Judicial Officer pursuant to authority delegated by the Postmaster General.

§ 961.2 Scope of rules.

The rules in this part apply to the hearing provided by section 5 of the Debt Collection Act of 1982, as amended, 5 U.S.C. 5514, challenging the Postal Service's determination of the existence or amount of an employee debt to the Postal Service, or of the terms of the employee's debt repayment schedule. In addition, these rules apply to a hearing under section 5 of the Debt Collection Act when an Administrative Law Judge or an Administrative Judge in the Judicial Officer Department is designated as the Hearing Official for a creditor Federal agency other than the Postal Service pursuant to an agreement between the Postal Service and that agency. In such cases, all references to Postal Service within these rules shall be construed to refer to the creditor Federal agency involved.

§ 961.3 Definitions.

As used in this part:

(a) *Employee* refers to a current employee of the Postal Service who is alleged to be indebted to the Postal Service; or to an employee of another Federal agency who is alleged to be indebted to that other creditor Federal agency and whose hearing under section 5 of the Debt Collection Act is being conducted under these rules.

(b) *General Counsel* refers to the General Counsel of the Postal Service, and includes a designated representative.

(c) *Hearing Official* refers to an Administrative Law Judge qualified to hear cases under the Administrative Procedure Act, an Administrative Judge appointed under the Contract Disputes Act of 1978, or other qualified person not under the control or supervision of the Postmaster General, who is designated by the Judicial Officer to conduct the hearing under section 5 of the Debt Collection Act of 1982, as amended, 5 U.S.C. 5514.

(d) *Judicial Officer* refers to the Judicial Officer, Associate Judicial Officer, or Acting Judicial Officer of the United States Postal Service.

(e) *Notice of Involuntary Administrative Salary Offsets Under the Debt Collection Act* refers to the formal written notice required by section 5 of the Debt Collection Act, including the provision of notice of the procedures under this Part, before involuntary

collection deductions can be taken from an employee's salary.

(f) *Postmaster/Installation Head* refers to the Postal Service official who is authorized under the Postal Service Employee and Labor Relations Manual to make the initial determination of employee indebtedness and to issue the "Notice of Involuntary Administrative Salary Offsets Under the Debt Collection Act."

(g) *Recorder* refers to the Recorder, Judicial Officer Department, U.S. Postal Service, located at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078. The Recorder's telephone number is (703) 812–1900, and the fax number is (703) 812–1901.

§ 961.4 Employee petition for a hearing.

(a) If an employee desires a hearing, prescribed by section 5 of the Debt Collection Act, to challenge the Postal Service's determination of the existence or amount of a debt, or to challenge the involuntary repayment terms proposed by the Postal Service, the employee must file a written, signed petition with the Recorder, on or before the fifteenth (15th) calendar day following the employee's receipt of the Postal Service's "Notice of Involuntary Administrative Salary Offsets Under the Debt Collection Act." The Hearing Official, in his or her discretion may waive this deadline upon a demonstration of good cause. In the event that the Postal Service initiated involuntary administrative salary offsets without having issued a Notice as required by the Debt Collection Act, the Hearing Official, in his or her discretion, may retain authority to resolve the debt assessment as if a Notice had been issued, and may order the Postal Service to return any improperly offset money.

(b) The hearing petition shall include the following:

(1) The words, "Petition for Hearing under the Debt Collection Act," prominently captioned at the top of the first page;

(2) The name of the employee, the employee's work address, home address, work telephone number, home telephone number, and email address, if any, or other address and telephone number at which the employee may be contacted during business hours;

(3) A statement of the date on which the employee received the "Notice of Involuntary Administrative Salary Offsets Under the Debt Collection Act," and a copy of the Notice;

(4) A statement indicating whether the employee challenges:

(i) The existence of the debt identified in the Notice of Involuntary Administrative Salary Offsets;

(ii) the amount of the debt identified in the Notice; and/or

(iii) the involuntary repayment terms identified by the Postal Service in the Notice. For each challenge, the employee's petition shall indicate the basis of the employee's disagreement. The employee should identify and explain the facts, evidence, and legal arguments which support his or her position;

(5) Copies of all records in the employee's possession which relate to the debt; and

(6) If an employee contends that the Postal Service's proposed offset schedule would result in a severe financial hardship on the employee, his or her spouse, and dependents, the employee shall identify an alternative offset schedule. As directed by the Hearing Official, the employee shall provide a statement and supporting documents indicating the employee's financial status. This statement should address total income from all sources; assets; liabilities; number of dependents; and expenses for food, housing, clothing, transportation, medical care, and exceptional expenses, if any.

(c) The employee shall file with the Recorder, any additional information directed by the Hearing Official.

§ 961.5 Effect of filing a petition.

Upon receipt and docketing of the employee's petition for a hearing, further collection activity by the Postal Service must cease, as required by section 5 of the Debt Collection Act until the petition is resolved by the Hearing Official.

§ 961.6 Filing, docketing and serving documents; computation of time; representation of parties.

(a) *Filing.* All documents relating to the Debt Collection Act hearing proceedings must be filed by the employee or the General Counsel's designee with the Recorder. (Normal Recorder office business hours are between 8:45 a.m. and 4:45 p.m., Eastern Time.) Unless otherwise directed by the Hearing Official, the party filing a document shall send a copy thereof to the opposing party.

(b) *Docketing.* The Recorder will maintain a record of Debt Collection Act proceedings and will assign a docket number to each such case. After notification of the docket number, the employee and the Postal Service's representative should refer to it on any further filings regarding the petition.

(c) *Time computation.* A filing period under the rules in this Part excludes the day the period begins, and includes the last day of the period unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the close of business on the next business day. Requests for extensions of time shall be made in writing prior to the date on which the submission is due, state the reason for the extension request, represent that the moving party has contacted the opposing party about the request, or made reasonable efforts to do so, and indicate whether the opposing party consents to the extension. Requests for extensions of time submitted after the date on which the submission was due shall explain why the moving party was unable to request an extension prior to the deadline.

(d) *Representation of parties.* The representative of the Postal Service, as designated by the General Counsel, shall file a notice of appearance as soon as practicable, but no later than the date for filing the answer. If an employee has a representative, he or she also shall file a notice of appearance as soon as practicable, and further transmissions of documents and other communications by and with the employee shall be made through his or her representative.

§ 961.7 Answer to petition.

Within 15 days from the date of receiving the petition, the Postal Service's representative shall file an answer to the petition, and attach all available relevant records and documents in support of the Postal Service's debt claim, and/or the administrative salary offset schedule proposed by the Postal Service for collecting any such claim. The answer shall provide a clear and thorough description of the basis for the Postal Service's determination of the alleged debt, its calculation of the amount of the alleged debt, and/or its proposed offset schedule.

§ 961.8 Hearing Official authority and responsibilities.

The Hearing Official's authority includes, but is not limited to, the following:

(a) Ruling on all motions or requests by the parties.

(b) Issuing notices, orders or memoranda to the parties concerning the hearing proceedings.

(c) Conducting telephone conferences with the parties to expedite the proceedings. The Hearing Official will prepare a Memorandum of Telephone Conference, which shall be transmitted to both parties and which serves as the official record of that conference.

(d) After considering the positions of the parties, determining whether an oral

hearing (or alternatively, a hearing solely on written submissions) shall be conducted, and setting the place, date, and time for such a hearing.

(e) Administering oaths or affirmations to witnesses.

(f) Conducting the hearing in a manner to maintain discipline and decorum while assuring that relevant, reliable and probative evidence is elicited on the issues in dispute, but irrelevant, immaterial or repetitious evidence is excluded. The Hearing Official in his or her discretion may examine witnesses to ensure that a satisfactory record is developed.

(g) Establishing the record in the case. The weight to be attached to any evidence of record will rest within the discretion of the Hearing Official. Except as the Hearing Official may otherwise order, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the written record, after notification by the Hearing Official that the record is closed. The Hearing Official may require either party, with appropriate notice to the other party, to submit additional evidence on any relevant matter.

(h) Granting reasonable time extensions or other relief for good cause shown in the Hearing Official's sole discretion.

(i) Issuing the final decision. The decision must include the determination of the amount and validity of the alleged debt and, where applicable, the repayment schedule. The Hearing Official will issue the decision as soon as practicable after the close of the record. Collection activity remains stayed until the decision has issued.

§ 961.9 Opportunity for oral hearing.

An oral hearing shall be conducted in the sole discretion of the Hearing Official. An oral hearing may be conducted in-person, by telephone, by video conference, or other appropriate means as directed by the Hearing Official. When the Hearing Official determines that an oral hearing shall not be conducted, the decision shall be based solely on the written submissions. The Hearing Official shall arrange for the recording and transcription of an oral hearing, which shall serve as the official record of the hearing. In the event of an unexcused absence, the hearing may proceed without the participation of the absent party.

§ 961.10 Effect of Hearing Official's decision; motion for reconsideration.

(a) After the receipt of written submissions or after the conclusion of the hearing and the receipt of post-hearing briefs, if any, the Hearing Official shall issue a written decision, which shall include the findings of fact and conclusions of law, relied upon.

(b) The Hearing Official shall send each party a copy of the decision. The Hearing Official's decision shall be the final administrative determination on the employee's debt or repayment schedule. No reconsideration of the decision will be allowed unless a motion for reconsideration is filed within 10 days from receipt of the decision and shows good cause for reconsideration. Reconsideration will be allowed only in the discretion of the Hearing Official. A motion for reconsideration by the employee will not operate to stay a collection action authorized by the Hearing Official's decision.

§ 961.11 Consequences for failure to comply with rules.

(a) The Hearing Official may determine that the employee has abandoned the right to a hearing, and that administrative offset may be initiated if the employee files his or her petition late without good cause; or files a withdrawal of the employee's petition for a hearing.

(b) The Hearing Official may determine that the administrative offset may not be initiated if the Postal Service fails to file the answer or files the answer late without good cause; or files a withdrawal of the debt determination at issue.

(c) If a party fails to comply with these Rules or the Hearing Official's orders, the Hearing Official may take such action as he or she deems reasonable and proper under the circumstances, including dismissing or granting the petition as appropriate.

§ 961.12 Ex parte communications.

Ex parte communications are not allowed between a party and the Hearing Official or the Official's staff. Ex parte communication means an oral or written communication, not on the public record, with one party only with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports or procedural matters. A memorandum of any communication between the Hearing Official and a party will be transmitted to both parties.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2014–08963 Filed 4–18–14; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–0943; FRL–9909–19–OAR]

RIN 2060–AQ55

Amendments to Delegation of Authority Provisions in the Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating amendments to the New Source Review (NSR) Prevention of Significant Deterioration (PSD) program that amend certain outdated language that limited the EPA's ability to delegate the federal PSD program to interested Indian tribes. This final action provides consistency with the current federal PSD regulatory requirements by allowing the EPA to delegate the PSD program to interested tribes for their attainment areas. The EPA regulations already provide for the administrative delegation of the PSD program to state and local governments for their attainment areas and administrative delegation of the nonattainment NSR program to states, tribes and local governments. This final rule deletes a restriction on tribes' ability to take delegation of the PSD program and includes tribes, along with state and local governments, to make it clear that tribes, as well as states and local governments, may voluntarily request and assume direct delegation of the NSR program in areas that are currently attaining the national ambient air quality standards (NAAQS). This final rule does not create any new requirements.

DATES: This final rule is effective April 21, 2014.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2010–0943. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the EPA's Docket Center, Public Reading Room, EPA West, Room 3334, 1301

Constitution Avenue NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Regina Chappell, Outreach and Information Division, Office of Air Quality Planning and Standards, Mail Code C–304–03, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3650; fax number: (919) 541–0942; email address: *chappell.regina@epa.gov*.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document?
II. Background Information for This Final Rule
A. What is the New Source Review Program?
B. What is the statutory authority and regulatory approach for this final rule?
C. Why is this final action needed?
III. Summary of Final Rule
IV. Summary of Impacts of the Amendments
V. Summary of Public Comments and the EPA Responses
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. General Information

A. Does this action apply to me?

Generally, this final rule applies only to tribal governments. It removes a restriction relating to delegation of the federal NSR PSD program to tribes and allows, but does not require, interested tribes to request such delegation for sources in their attainment areas. It does not make changes to the underlying federal PSD program requirements and thus should not have any significant impact on new or modified sources.

B. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this action will also be available on the Worldwide Web (WWW). Following signature, a copy of this final action will be posted in the regulations and standards section of the NSR home page located at *http://www.epa.gov/nsr/*, on the tribal air home page at *http://www.epa.gov/oar/tribal* and on the Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

II. Background Information for This Final Rule

A. What is the New Source Review Program?

The major NSR program contained in parts C and D of title I of the Clean Air Act (CAA or Act) is a preconstruction review and permitting program applicable to new major sources and major modifications at existing sources. In areas designated as meeting the NAAQS ("attainment" areas) or for which there is insufficient information to determine whether they meet the NAAQS ("unclassifiable" or "unclassifiable/attainment" areas), the NSR requirements under part C of title I of the Act apply. We call this portion of the major NSR program the "Prevention of Significant Deterioration" or PSD program. In areas not meeting the NAAQS and in ozone transport regions (OTR), the major NSR program is implemented under the requirements of part D of title I of the Act. We call this program the "nonattainment" major NSR program. We have promulgated rules in 40 CFR 52.21 to implement the PSD program in portions of the country that do not have approved state or tribal PSD programs. This final rule amends 40 CFR 52.21.

B. What is the statutory authority and regulatory approach for this final rule?

The authority for this proposed action is the CAA section 301(a). The EPA notes that CAA section 301(d) (which postdates the original regulation that established § 52.21(u), a provision that is being amended by this rule) and its implementing regulations under the Tribal Authority Rule (TAR) at 40 CFR 49.6 and 49.7 allow tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction. These provisions also establish the criteria tribes must meet and the types of information that must be included in tribal applications to obtain eligibility to administer tribal programs, including Tribal Implementation Plans and tribal NSR programs. The TAR allows tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction.

Although section 301(d) of the Act and the TAR authorize the EPA to review and approve tribal programs, neither the Act nor the regulations require the EPA approval of tribal programs as the sole mechanism available for tribal agencies to take on permitting responsibilities. Some tribes may choose not to develop their own tribal NSR programs for submission to the EPA for approval under the TAR, but may still wish to assist the EPA in implementing all or some portion of the federal PSD program for their area of Indian country. Accordingly, we are amending 40 CFR 52.21 to remove a restriction that has prevented the EPA from delegating administration of the federal PSD program to interested tribal agencies for their attainment areas. By administering the federal program through a delegation, tribal agencies may remain appropriately involved in implementation of an important air quality program and may develop their own capacity to manage such programs in the future should they choose to do so. Removing this restriction is consistent with the EPA's existing and well-established procedures for delegating administration of federal CAA programs, including existing provisions at 40 CFR 52.21(u)—which already provides for administrative delegation to state and local air agencies, but which currently prevents delegation to interested tribes—40 CFR 71.4(j) and 71.10 (federal operating permits), 40 CFR 49.122 (federal air rules for Indian reservations in the Pacific Northwest), and 40 CFR 49.161 and 49.173 (NSR rules for Indian country).

C. Why is this final action needed?

This final action enables the EPA to delegate the federal PSD program (40 CFR 52.21(u)) to interested Indian tribes. This action is consistent with existing PSD regulatory requirements, which already provide for delegation of administration of the program to states, and makes that opportunity available to interested tribes.

III. Summary of Final Rule

This rule amends the NSR PSD program provisions at 40 CFR 52.21, paragraph (u) Delegation of Authority. In paragraph (u)(1), we are correcting an erroneous cross reference and deleting a cross reference that is no longer needed. In paragraph (u)(2)(i), the provisions stated that the delegate agency shall consult with the appropriate state and local air pollution control agency. We have included tribes along with state and local air pollution control agencies in this provision to provide equivalent involvement for tribal air pollution control agencies. Paragraph (u)(3) was deleted to remove the restriction that stated the Administrator shall not redelegate review authority to anyone other than an EPA Regional Office except where the state has assumed jurisdiction over such land. This restriction had prevented the EPA from delegating the PSD program to interested tribes and will no longer be in effect once paragraph (u) is amended. Paragraph (u)(4) was designated as the new paragraph (u)(3). These changes provide appropriate opportunities for interested tribes to seek delegation of the federal PSD program over relevant sources and modifications in their areas.

IV. Summary of Impacts of the Amendments

This final action will allow, but not require, interested tribes to take direct delegation of the federal PSD program. It does not make changes to the underlying federal requirement that the EPA must implement the program where delegation does not occur and thus should not have a significant impact on new or modified sources.

The EPA has administered the delegation process under § 52.21(u) for the federal PSD Program and the EPA intends to continue using the same approach when applying this provision to tribal governments. The provision now designated as § 52.21(u) has been in place, in one form or another, since the federal Prevention of Significant Air Quality Deterioration rule was first promulgated in 1974. (See 39 FR 42510, 42517, December 5, 1974; 45 FR 33290, May 19, 1980.) Over time, the EPA has used that provision to successfully delegate authority to implement the Federal PSD Program to numerous state and local air pollution control agencies. See e.g. 46 FR 9580, Jan. 29, 1981 (delegations to states in Region 5). Those delegations are authorized by the EPA's Regional Offices. The process for delegating programs varies somewhat from Region to Region. Regardless of the exact process used, however, the specifics of the delegation are embodied in a formal delegation agreement. The agreement becomes effective when signed by the Regional Administrator and the state or local agency. The EPA believes that the many prior successful delegations carried out under § 52.21(u) provide an appropriate background of experience for the Agency as it moves forward with including interested tribes as potential delegate agencies for purposes of the PSD program. The EPA expects that the same procedures that have been used with state and local agencies will prove relevant and equally successful as tribes begin to seek administrative delegation of the Federal PSD Program. Precise details and functions at issue with any particular delegation will—as they have been with states and local agencies—be memorialized in an applicable written delegation agreement between the EPA and the delegated tribal governing body.

The EPA notes that it has since written additional regulations that include somewhat more detailed delegation provisions. With regard to delegations to tribes, these include, for instance, the Federal Air Rules for Indian Reservations in Idaho, Oregon and Washington and the rule titled Review of New Sources and Modifications in Indian Country. In those cases, the EPA was establishing new regulatory programs for areas of Indian country, including newly-established administrative delegation opportunities and procedures. In each case, the EPA provided a discussion of the delegation process that was appropriate for the new programs. By contrast, as discussed above in the case of § 52.21(u), the EPA already has a substantial body of experience and history applying the provision that one can look to for guidance. The EPA believes the various provisions the EPA has established for administrative delegations are appropriate for the particular programs in which they are included. As a result, some of the more recent delegation provisions differ from § 52.21(u) in some respects.

V. Summary of Public Comments and the EPA Responses

The EPA received a total of five public comments during the 60-day open comment period of the proposed rule. Specifically, two were from tribes, one from an industry party and two were from private citizens. The tribes and private citizens that commented on the proposed rule were very supportive of this action. They stated that it was a practical rule that would not only allow interested tribes to seek delegation of the program but also provide additional opportunities for self governance for tribal communities. One industry party commented that they support the EPA's efforts to build tribal capacity for implementing and enforcing CAA programs and that it is important to provide opportunities to tribes to be involved with the implementation of CAA programs on tribal lands.

We agree that this rule is important to increase opportunities for involvement of interested tribes in air program implementation and to promote self governance for tribal communities. It is designed to eliminate a prior limitation on tribal involvement and expand the Agency's ability to work with interested tribes on implementation of the federal PSD program.

One tribe commented that there should be agency support and outreach to tribes that may not have been involved with this rulemaking process to assist them with the implementation of the program. Following promulgation, we intend to hold additional conference calls and trainings to assist those interested tribes in the delegation process.

We also received comments from one industry party focusing on the overall delegation of administrative authority to include legal and tribal authority, delegation process and agreement, and TAS applicability. This company commented that the CAA does not give the EPA legal authority to delegate its federal authority to a state or tribe to administer the EPA's federal regulations. We disagree, and believe that section 301(a) of the CAA provides clear legal authority for administrative delegation as discussed in the Tribal Authority rule. They further stated that the Agency's administrative delegation provisions in the federal PSD rules must clearly explain that tribal law needs only to authorize the applicable tribal agency to administer the federal PSD rules and provisions for which it is delegated responsibility. The EPA notes that where the Agency delegates administration of the federal PSD program to a state, local agency or tribe, the program remains applicable to the regulated sources under federal legal authority established under the CAA and the EPA's regulations.

Industry commented that the rule must clearly describe the delegation process and what the delegation agreement does and does not do. The EPA anticipates being consistent with prior delegations to states and local agencies, to include processes, scope and limitations, and that these would be reflected in a formal delegation agreement. Industry also commented that TAS is not required for a delegation

of administrative authority. The EPA agrees. This amendment will put tribes on an equal footing with state and local air pollution control agencies for purposes of taking delegation to assist the EPA with administration of the federal PSD program.

The full text of public comments and the EPA's responses to those comments can be found in the Amendments to Delegation of Authority Provisions in the PSD Program docket (EPA–HQ–OAR–2010–0943).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Orders 12866 and 13563 (76 FR 3281, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action only allows tribes to implement an existing program. This action does not change the underlying federal requirements; it allows interested tribes to accept delegation. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR 52.21 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0003. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Small entities will not incur any adverse impacts as a result of this rule because this action does not create any new requirements or burdens. No costs are associated with this final rule amending part 52. This final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action allows tribes to voluntarily take delegation of the PSD requirements but does not require them to do so.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The EPA has implementing authority for 40 CFR part 52 for Indian country. This final action allows interested tribes to take delegation of the federal program if they choose; it does not modify the responsibility of the EPA to implement the program where no delegation occurs. Thus, E.O. 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) the EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

The EPA has concluded that this action will have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. This final rule does not impose any new requirements on tribes so it does not impose substantial direct costs. However, it does support tribal self-governance by enabling tribes to implement the federal PSD program as the EPA's delegate, if they choose.

The EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. Tribal consultation was offered in a consultation letter to all federally recognized tribes on November 10, 2011. We provided consultation to 17 tribes who requested it. We have also participated in various tribal meetings attended by tribal environmental professionals, i.e., National Tribal Air Association (NTAA), National Tribal Forum (NTF). We received no adverse comments when this action was presented at those various meetings. The EPA specifically solicited additional comment on this proposed action from tribal officials.

During development of the proposal, the EPA notified tribes in the summer of 2011 of our intent to propose amendments to the delegation of authority provisions in the PSD program during a regularly scheduled meeting with the NTAA. These NTAA meetings update members of upcoming EPA policies and regulations and to receive input from them on the effects of these efforts in Indian country.

The Agency held a consultation call on January 11, 2012, with one tribe. Another consultation call was held on January 30, 2012, with 16 tribes. Tribal comments received during consultations on the proposed rule were: tribes indicated they were in favor of the rule; described the proposal as a responsible use of an Agency rulemaking; and described the proposal as supporting tribal self-governance. The EPA considered the additional input from these consultation calls and coordination activities, in conjunction with public comments, in this final rule development.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1977) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the E.O. has the potential to influence the regulation. This action is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under E.O. 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final rule imposes no new requirements but does allow interested tribes to accept delegation of the existing federal program.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this final rule and other required information to the United States Senate, the United States House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective upon publication in the **Federal Register**.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Indians, Indians-law, and Indians-tribal government; Incorporation by reference.

Dated: April 11, 2014.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 2. Amend § 52.21 by revising paragraphs (u)(1) and (u)(2)(i) and by removing paragraph (u)(3) and redesignating paragraph (u)(4) as paragraph (u)(3) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(u) *Delegation of authority.* (1) The Administrator shall have the authority to delegate his responsibility for conducting source review pursuant to this section, in accordance with paragraph (u)(2) of this section.

(2) * * *

(i) Where the delegate agency is not an air pollution control agency, it shall consult with the appropriate state, tribe, and local air pollution control agency prior to making any determination under this section. Similarly, where the delegate agency does not have continuing responsibility for managing land use, it shall consult with the appropriate state, tribe, and local agency primarily responsible for managing land use prior to making any determination under this section.

* * * * *

[FR Doc. 2014–08919 Filed 4–18–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 69

[EPA–R09–OAR–2013–0697; FRL–9909–18–Region 9]

Approval and Promulgation of Implementation Plans; Commonwealth of the Northern Mariana Islands; Prevention of Significant Deterioration; Special Exemptions From Requirements of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Clean Air Act, the Environmental Protection Agency (EPA) is taking final action to disapprove the state implementation plan (SIP) for the Commonwealth of the Northern Mariana Islands (CNMI) with respect to prevention of significant deterioration (PSD), and to incorporate by reference the Federal PSD regulations into the applicable CNMI plan. EPA is also taking final action to grant a petition by CNMI for an exemption of the applicable PSD major source baseline date, and to establish an alternate date, January 13, 1997, as the major source baseline date and trigger date in CNMI. EPA is also making certain corrections to errors that were made in previous rulemakings related to the CNMI SIP. This action establishes the Federal PSD regulations as a basic element of the applicable CNMI plan and, through the exemption, establishes January 13, 1997 as the major source baseline date (and trigger date) under the PSD program in CNMI for sulfur dioxide, PM_{10} and nitrogen dioxide.

DATES: *Effective Date:* This rule is effective on May 21, 2014.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2013–0697 for this action. The index to the docket is available electronically at *https://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: La Weeda Ward, (213) 244–1812 or *ward.laweeda@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. Final Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On November 25, 2013 (78 FR 70248), under section 110(k) of the Clean Air Act (CAA or "Act"), EPA proposed to disapprove the state implementation plan (SIP) for the Commonwealth of the Northern Mariana Islands (CNMI) with respect to prevention of significant deterioration (PSD), and to incorporate by reference the Federal PSD regulations into the applicable CNMI plan.[1] EPA also proposed to grant, under section 325(a)(1) of the Act, a petition by CNMI for an exemption of the applicable PSD major source baseline date under Federal PSD regulations, and to establish an alternate date, January 13, 1997, as the major source baseline date and trigger date for certain pollutants in CNMI. Lastly, under section 110(k)(6) of the Act, EPA proposed to make certain corrections to errors that were made in previous rulemakings involving the CNMI SIP.

As explained in our November 25, 2013 proposed rule, the action would establish the Federal PSD regulations as a basic element of the applicable CNMI plan and, through the exemption, would establish January 13, 1997 as the major source baseline date (and trigger date) under the PSD program in CNMI for sulfur dioxide, PM_{10} and nitrogen dioxide.

Our November 25, 2013 proposed rule provides detailed background information related to PSD requirements under part C of title I of the CAA (and EPA's PSD SIP requirements in 40 CFR 51.166) and petitions by governors of certain territories under CAA section 325(a) for exemptions from certain CAA requirements; the rationale for our conclusion that the CNMI SIP does not meet the requirements for PSD under part C of title I of the CAA and 40 CFR 51.166; the rationale for granting CNMI's petition for an alternate major source baseline date and the establishment of January 13, 1997 as the PSD major source baseline date and trigger date (with respect to sulfur dioxide, PM_{10}, and nitrogen dioxide); and a description of the specific corrections to previous SIP actions that are needed to better identify and clarify the contents of the CNMI SIP as set forth in 40 CFR part 52. The reader is directed to the proposed rule for the details, which are not repeated here.

II. Public Comments and EPA Responses

Our November 25, 2013 proposed rule provided a 30-day comment period and an opportunity to request a public hearing. During this period, we received no comments on our proposed action and no request for a public hearing.

III. Final Action

Under section 110(k) of the CAA, EPA is taking final action to disapprove the CNMI SIP with respect to PSD, and incorporate by reference the Federal PSD regulations into the applicable CNMI plan.[2] EPA is also taking final action to grant a petition by CNMI for an exemption of the PSD major source baseline date, and to establish an alternate date, January 13, 1997, as the major source baseline date and trigger date for sulfur dioxide, PM_{10}, and nitrogen dioxide in CNMI. Lastly, in addition to making conforming amendments to 40 CFR part 52, subparts A and FFF and to 40 CFR part 69, subpart C, EPA is also making certain corrections to certain errors in 40 CFR part 52 that were made in previous rulemakings involving the CNMI SIP.

This action establishes EPA's PSD regulations as a basic element of the applicable CNMI plan, and, through the exemption, establishes a major source baseline date and trigger date for sulfur dioxide, PM_{10}, and nitrogen dioxide on CNMI of January 13, 1997.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review by the Office of Management and Budget (OMB) under E.O. 12866 and E.O. 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Reduction Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because, while the disapproval of the CNMI SIP with respect to PSD will lead to the application of the Federal PSD regulations to CNMI, the basic PSD statutory requirements for major emitting facilities to obtain a PSD permit already apply within CNMI, and the incremental impact associated with application of the specific requirements under the Federal PSD regulations will be offset by EPA's grant of CNMI's petition for an exemption from the original PSD major source baseline dates. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

[1] CNMI is an insular territory of the United States. CNMI consists of 15 islands of volcanic origin which are located approximately 145° to 146° east and from 14° to 20° north of the equator. The islands extend in a general north-south direction for approximately 420 nautical miles from the Island of Farallon de Pajaros in the north to the island of Rota in the south. CNMI lies in the western part of the Pacific Ocean and is located approximately 1,250 miles south of Tokyo, 1,440 miles east of Manila, and 110 miles north of Guam. Based on Bureau of Census 2010 population counts, the total population of CNMI is approximately 54,000 with the majority of the population residing on Saipan.

[2] While EPA is taking final action to disapprove the CNMI SIP with respect to PSD, such disapproval does not affect the validity of previously approved rules in the CNMI SIP. Such SIP rules continue to be part of the applicable CNMI plan unless and until EPA approves their revocation or revision.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the disapproval of the CNMI SIP with respect to PSD, considered together with the incorporation of the Federal PSD regulations, and grant of an exemption request with respect to the PSD major source baseline date, does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. While the disapproval of the CNMI SIP with respect to PSD will lead to the application of the Federal PSD regulations to CNMI, the basic PSD statutory requirements for major emitting facilities to obtain a PSD permit already apply within CNMI, and the incremental impact associated with application of the specific requirements under the Federal PSD regulations will be offset by EPA's grant of CNMI's petition for an exemption from the original PSD major source baseline dates. Accordingly, the additional costs to State, local, or tribal governments, or to the private sector, will not be significant for the purposes of section 202 of the Unfunded Mandates Act.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves the CNMI SIP with respect to PSD, incorporates the Federal PSD regulations, and grants an exemption request with respect to the PSD major source baseline date, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it disapproves the CNMI SIP with respect to PSD, incorporates the Federal PSD regulations, and grants an exemption request with respect to the PSD major source baseline date.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order (E.O.) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

This rulemaking includes a review of the CNMI SIP relative to PSD requirements, incorporation of EPA's PSD regulation into the applicable CNMI plan, and a grant of an exemption to CNMI to the original PSD major source baseline dates. With respect to EPA's review of the CNMI SIP, EPA's

role is to approve or disapprove state choices, based on the criteria of the Clean Air Act, and incorporation of EPA's PSD regulation is the established remedy for disapproval of the CNMI SIP with respect to PSD. Thus, the EPA lacks the discretionary authority to address environmental justice in those two aspects of this rulemaking.

EPA does have discretionary authority to address environment justice with respect to EPA's consideration of the exemption request from CNMI and has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This is because, due to the lack of documentation of major source emissions changes from the original PSD baseline dates, application of the original major source baseline dates could lead to speculative and uncertain estimates of PSD increment consumption and correspondingly speculative and uncertain levels of environmental protection. In contrast, EPA's grant of CNMI's exemption request sets the stage for consistent and uniform PSD increment tracking and protection within CNMI.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 20, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 69

Environmental protection, Air pollution control.

Dated: April 8, 2014.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A—General Provisions

§ 52.02 [Amended]

■ 2. Section 52.02 is amended by:

■ a. Adding "and FFF" after "DDD" in paragraph (d) introductory text; and

■ b. Adding "Commonwealth of the Northern Mariana Islands," after "American Samoa," in paragraph (d)(2)(ix).

§ 52.16 [Amended]

■ 3. Amend § 52.16 in paragraph (b)(9) by adding "Commonwealth of the Northern Mariana Islands," after "American Samoa,".

§ 52.21 [Amended]

■ 4. Amend § 52.21 in paragraph (a)(1) by adding "and FFF" after "DDD" two times.

Subpart FFF—Commonwealth of the Northern Mariana Islands

§ 52.2920 [Amended]

■ 5. In § 52.2920, amend the table in paragraph (c), by removing the entry for "Part VIII," and under "Part VIII," by removing the entries for "Paragraph A," "Paragraph B," "Paragraph C," "Paragraph D," "Paragraph E," "Paragraph F," "Table VIII–1," "Paragraph G," and "Paragraph H."

§ 52.2921 [Amended]

■ 6. Amend § 52.2921 in paragraph (c)(1)(i)(A) by removing "of lead" after "major sources".

■ 7. Section 52.2922 is added to read as follows:

§ 52.2922 Significant deterioration of air quality.

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality.

(b) *Regulations for preventing significant deterioration of air quality.* The provisions of § 52.21 except paragraphs (a)(1), (b)(14)(i)(*a*) and (*b*), (b)(14)(ii)(*a*) and (*b*), (i)(5)(i)(*c*), and (k)(2) are hereby incorporated and made a part of the applicable plan for the Commonwealth of the Northern Mariana Islands.

(c) For the purposes of applying the requirements of § 52.21 within the Commonwealth of the Northern Mariana Islands, the terms "major source baseline date" and "trigger date" mean January 13, 1997 in the case of sulfur dioxide, PM_{10}, and nitrogen dioxide.

PART 69—SPECIAL EXEMPTIONS FROM REQUIREMENTS OF THE CLEAN AIR ACT

■ 8. The authority citation for part 69 continues to read as follows:

Authority: 42 U.S.C. 7545(c), (g) and (i), and 7625–1.

Subpart C—Commonwealth of the Northern Mariana Islands

■ 9. Section 69.31 is added to read as follows:

§ 69.31 New Exemptions.

(a) *Change to Major Source Baseline Date and Trigger Date.* Pursuant to section 325(a) of the Clean Air Act and a petition submitted by the Governor of the Commonwealth of the Northern Mariana Islands, EPA grants an exemption to the major source baseline dates and trigger dates for sulfur dioxide, PM_{10}, and nitrogen dioxide under 40 CFR 52.21, and establishes January 13, 1997 as the major source baseline date and trigger date for these pollutants in the Commonwealth of the Northern Mariana Islands. This exemption applies solely to the PSD major source baseline date and trigger date in the Commonwealth of the Northern Mariana Islands. Owners and operators of air pollutant sources are required to comply with all other applicable requirements of the Clean Air

Act. For purposes of complying with any applicable requirement that is triggered by, implemented or calculated from the PSD major source baseline date, such requirement, increment, or calculation shall, for sources located within the Commonwealth of the Northern Mariana Islands, use January 13, 1997 as the PSD major source baseline date and trigger date for sulfur dioxide, PM_{10}, and nitrogen dioxide.

(b) [Reserved]

[FR Doc. 2014–08611 Filed 4–18–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 201

RIN 0750–AI21

Defense Federal Acquisition Regulation Supplement: Contracting Officer's Representative (DFARS Case 2013–D023)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove coverage concerning contracting officer's representative responsibilities that is procedural in nature.

DATES: Effective April 21, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Janetta Brewer, telephone 571–372–6104.

SUPPLEMENTARY INFORMATION:

I. Discussion

DoD is revising DFARS 201.602–2 to remove guidance that is internal to DoD concerning contracting officer's representative (COR) responsibilities. COR responsibilities, addressed at DFARS Procedures, Guidance, and Information (PGI) 201.602–2, are also being revised in conjunction with this DFARS change. Included in the PGI update is a link to the DoD COR Handbook, dated March 22, 2012, which provides detailed guidance on COR appointments and duties.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

Publication of proposed regulations, 41 U.S.C. 1707, is the statute which applies to the publication of the Federal Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because the change is not substantive and only modifies the internal operating procedures of DoD.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1, and 41 U.S.C. 1707 does not require publication for public comment.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 201

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 201 is amended as follows:

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 1. The authority citation for 48 CFR 201 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Section 201.602–2 is revised to read as follows:

201.602–2 Responsibilities.

(d) Follow the procedures at PGI 201.602–2 regarding designation, assignment, and responsibilities of a contracting officer's representative (COR).

(1) A COR shall be an employee, military or civilian, of the U.S. Government, a foreign government, or a North Atlantic Treaty Organization/coalition partner. In no case shall contractor personnel serve as CORs.

[FR Doc. 2014–08858 Filed 4–18–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 216, 247, and 252

RIN 0750–AH90

Defense Federal Acquisition Regulation Supplement: Clauses With Alternates—Transportation (DFARS Case 2012–D057)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to revise and update transportation-related clauses and their prescriptions to create basic and alternate clauses structured in a manner to facilitate use of automated contract writing systems. The rule also includes the full text of each alternate, rather than only showing the paragraphs that differ from the basic clause.

DATES: Effective April 21, 2014.

FOR FURTHER INFORMATION CONTACT: Annette Gray, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 78 FR 48397 on August 8, 2013, to revise the presentation of DFARS part 247 clauses with alternates and their prescriptions in the DFARS. One respondent

submitted a public comment in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule. A discussion of the comment is provided below.

A. Public Comment

Comment: The respondent recommended revising the prescription for the proposed clause at 252.216–70XX (renumbered 252.216–7010 in the final rule) to include a statement that the clause applies to requirements-type contracts.

Response: DoD reviewed and accepted the public comment in the development of the final rule. In the prescription at DFARS 216.506(d) for the clause at 252.216–7010, Requirements, (formerly DFARS 252.247–7015, Requirements) the phrase "when a requirements contract is contemplated" is added.

B. Other Changes

Minor editorial changes were made: (1) To standardize language used in the final rule for the clause prescriptions and prefaces in order to provide uniform arrangement in the regulations, and (2) in 252.247–7023, to provide for consistent use of the term "foreign-flag vessels" in the clause.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to revise and update transportation-related clauses and their prescriptions to create basic and alternate clauses structured in a manner to facilitate use of automated contract writing systems. The rule also includes the full text of each alternate, rather than only showing the paragraphs that differ from the basic clause.

There will be an initial small impact on potential offerors, including small businesses, because this rule provides an unfamiliar format for provision/clause alternates in solicitations and contracts issued by DoD contracting activities. According to the Federal Procurement Data System, in Fiscal Year 2012, DoD made approximately 270,000 contract awards (not including modification and orders) that exceeded the micro-purchase threshold, of which approximately 180,000 (67%) were awarded to small businesses. It is unknown how many of these contracts were awarded that included an alternate to a DFARS provision or clause. Since similar changes are being made (by part number) to all DFARS prescriptions and clauses and these changes are not substantive, this rule is expected to result in a net savings for potential offerors, including small businesses, by increasing clarity.

No comments were received from the public on the Regulatory Flexibility analysis. No comments were received from the Chief Counsel for Advocacy of the Small Business Administration.

This rule does not add any new reporting, recordkeeping, or other compliance requirements. It should not result in any economic impact on small entities.

There are no alternatives to this rule that would attain the stated objective of making the terms of clause alternates clearer and that will facilitate the use of automated contract writing systems.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 216, 247, and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 216, 247, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 216, 247, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by revising paragraph (f)(lxv) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(lxv) Use the basic or one of the alternates of the clause at 252.247–7023, Transportation of Supplies by Sea, as prescribed in 247.574(b), to comply with the Cargo Preference Act of 1904 (10 U.S.C. 2631(a)).

(A) Use the basic clause as prescribed in 247.574(b)(1).

(B) Use the alternate I clause as prescribed in 247.574(b)(2).

(C) Use the alternate II clause as prescribed in 247.574(b)(3).

* * * * *

PART 216—TYPES OF CONTRACTS

■ 3. In 216.506, revise paragraph (d) to read as follows:

216.506 Solicitation provisions and contract clauses.

* * * * *

(d) Use the basic or the alternate of the clause at 252.216–7010, Requirements, in lieu of the clause at FAR 52.216–21, Requirements, in solicitations and contracts when a requirements contract for the preparation of personal property for shipment or storage, or for the performance of intra-city or intra-area movement, is contemplated.

(1) Use the basic clause if the acquisition does not involve a partial small business set-aside.

(2) Use the alternate I clause if the acquisition involves a partial small business set-aside.

* * * * *

PART 247—TRANSPORTATION

■ 4. Revise the section 247.271 heading to read as follows:

247.271 Contracts for the preparation of personal property for shipment or storage or for performance of intra-city or intra-area movement.

* * * * *

■ 5. Amend section 247.271–3 by—

■ a. In the introductory text, removing "and for performance of intra-city or intra-area movement," and adding "or for performance of intra-city or intra-area movement," in its place;

■ b. Revising paragraph (a);

■ c. Removing paragraph (j) and redesignating paragraphs (k) through (p) as paragraphs (j) through (o), respectively; and

■ d. Adding a new paragraph (p).

The revision and addition read as follows:

247.271–3 Solicitation provisions, schedule formats, and contract clauses.

* * * * *

(a) Use the basic or the alternate of the provision at 252.247–7008, Evaluation of Bids.

(1) Use the basic provision when there are no "additional services" items being added to the schedule.

(2) Use the alternate I provision when adding "additional services" items to the schedule.

* * * * *

(p) See the prescription at 216.506(d) requiring the use of 252.216–7010, Requirements.

■ 6. In 247.574, revise paragraph (b) to read as follows:

247.574 Solicitation provisions and contract clauses.

* * * * *

(b) Use the basic or one of the alternates of the clause at 252.247–7023, Transportation of Supplies by Sea, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, except those for direct purchase of ocean transportation services.

(1) Use the basic clause unless any of the supplies to be transported are commercial items that are—

(i) Shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations when the contract is not a construction contract; or

(ii) Commissary or exchange cargoes transported outside of the Defense Transportation System when the contract is not a construction contract.

(2) Use the alternate I clause if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations when the contract is not a construction contract.

(3) Use the alternate II clause if any of the supplies to be transported are commercial items that are commissary or exchange cargoes transported outside of the Defense Transportation System (10 U.S.C. 2643), when the contract is not a construction contract.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add section 252.216–7010 to read as follows:

252.216–7010 Requirements.

As prescribed in 216.506(d), use one of the following clauses:

Basic. As prescribed at 216.506(d)(1), use the following clause.

REQUIREMENTS—BASIC (APR 2014)

(a) This is a requirements contract for the supplies or services specified and effective for the period stated in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(e) If the Government urgently requires delivery of any quantity of an item before the earliest date that delivery may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

(f) Orders issued during the effective period of this contract and not completed within that time shall be completed by the Contractor within the time specified in the order. The rights and obligations of the Contractor and the Government for those orders shall be governed by the terms of this contract to the same extent as if completed during the effective period.

(End of clause)

Alternate I. As prescribed in 216.506(d)(2), use the following clause, which uses a different paragraph (c) than the basic clause.

REQUIREMENTS—ALTERNATE I (APR 2014)

(a) This is a requirements contract for the supplies or services specified and effective for the period stated in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(c) The Government's requirements for each item or subitem of supplies or services described in the Schedule are being purchased through one non-set-aside contract and one set-aside contract. Therefore, the Government shall order from each Contractor approximately one-half of the total supplies or services specified in the Schedule that are required to be purchased by the specified Government activity or activities. The Government may choose between the set-aside Contractor and the non-set-aside Contractor in placing any particular order. However, the Government shall allocate successive orders, in accordance with its delivery requirements, to maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two Contractors.

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(e) If the Government urgently requires delivery of any quantity of an item before the earliest date that delivery may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

(f) Orders issued during the effective period of this contract and not completed within that time shall be completed by the Contractor within the time specified in the order. The rights and obligations of the Contractor and the Government for those orders shall be governed by the terms of this contract to the same extent as if completed during the effective period.

(End of clause)

■ 8. Amend section 252.247–7008 by—

■ a. Revising the introductory text, clause title and date; and

■ b. Revising Alternate I.

The revisions read as follows:

252.247–7008 Evaluation of Bids.

As prescribed in 247.271–3(a), use one of the following provisions:

Basic. As prescribed at 247.271–3(a)(1), use the following provision.

EVALUATION OF BIDS—BASIC (APR 2014)

* * * * *

Alternate I. As prescribed in 247.271–4(a)(2), use the following provision, which adds a paragraph (e) not included in the basic provision.

EVALUATION OF BIDS—ALTERNATE I (APR 2014)

(a) The Government will evaluate bids on the basis of total aggregate price of all items within an area of performance under a given schedule.

(1) An offeror must bid on all items within a specified area of performance for a given schedule. Failure to do so shall be cause for rejection of the bid for that area of performance of that Schedule. If there is to be no charge for an item, an entry such as "No Charge," or the letters "N/C" or "0," must be made in the unit price column of the Schedule.

(2) Any bid which stipulates minimum charges or graduated prices for any or all items shall be rejected for that area of performance within the Schedule.

(b) In addition to other factors, the Contracting Officer will evaluate bids on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards).

(1) In making this evaluation, the Contracting Officer will assume that the administrative cost to the Government for issuing and administering each contract awarded under this solicitation would be $500.

(2) Individual awards will be for the items and combinations of items which result in the lowest aggregate cost to the Government, including the administrative costs in paragraph (b)(1).

(c) When drayage is necessary for the accomplishment of any item in the bid schedule, the Offeror shall include in the unit price any costs for bridge or ferry tolls, road use charges or similar expenses.

(d) Unless otherwise provided in this solicitation, the Offeror shall state prices in amounts per hundred pounds on gross or net weights, whichever is applicable. All charges shall be subject to, and payable on, the basis of 100 pounds minimum weight for unaccompanied baggage and a 500 pound minimum weight for household goods, net or gross weight, whichever is applicable.

(e) Notwithstanding paragraph (a), when "additional services" are added to any schedule, such "additional services" items will not be considered in the evaluation of bids.

(End of provision)

252.247–7015 [Removed and Reserved]

■ 9. Remove and reserve section 252.247–7015.

■ 10. Amend section 252.247–7023 by—

■ a. Revising the introductory text, clause title and date;

■ b. In paragraph (a), removing the numerical paragraph designations of (1) through (7) for the definition paragraphs; and removing *"foreign flag vessel"* and adding *"foreign-flag vessel"* in its place.

■ c. In paragraph (d), removing "for use of other than U.S.-flag vessels" and adding "for use of foreign-flag vessels" in its place.

■ d. In paragraph (f) introductory text, removing "The Contractor shall" and adding "If this contract exceeds the simplified acquisition threshold, the Contractor shall" in its place; and in paragraphs (f)(3) and (4), removing "non-U.S.-flag" and adding "foreign-flag" in its place

■ e. In paragraph (g), removing "If the final invoice" and adding "If this contract exceeds the simplified acquisition threshold and the final invoice" in its place; and removing "non-U.S.-flag vessels" and adding "foreign-flag vessels" in its place.

■ f. Revising Alternate I and Alternate II; and

■ g. Removing Alternate III.

The revisions read as follows:

252.247–7023 Transportation of Supplies by Sea.

As prescribed in 247.574(b), use one of the following clauses:

Basic. As prescribed in 247.574(b)(1), use the following clause.

TRANSPORTATION OF SUPPLIES BY SEA—BASIC (APR 2014)

* * * * *

Alternate I. As prescribed in 247.574(b)(2), use the following clause, which uses a different paragraph (b) than the basic clause.

TRANSPORTATION OF SUPPLIES BY SEA—ALTERNATE I (APR 2014)

(a) *Definitions.* As used in this clause—

Components means articles, materials, and supplies incorporated directly into end products at any level of manufacture, fabrication, or assembly by the Contractor or any subcontractor.

Department of Defense (DoD) means the Army, Navy, Air Force, Marine Corps, and defense agencies.

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Ocean transportation means any transportation aboard a ship, vessel, boat, barge, or ferry through international waters.

Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

Supplies means all property, except land and interests in land, that is clearly identifiable for eventual use by or owned by the DoD at the time of transportation by sea.

(i) An item is clearly identifiable for eventual use by the DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

(ii) *Supplies* includes (but is not limited to) public works; buildings and facilities; ships; floating equipment and vessels of every character, type, and description, with parts, subassemblies, accessories, and equipment; machine tools; material; equipment; stores of all kinds; end items; construction materials; and components of the foregoing.

U.S.-flag vessel means a vessel of the United States or belonging to the United States, including any vessel registered or having national status under the laws of the United States.

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract.

(2) A subcontractor transporting supplies by sea under this contract shall use U.S.-flag vessels if the supplies being transported are

(i) Noncommercial items; or

(ii) Commercial items that

(A) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it subcontracts for f.o.b. destination shipment);

(B) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations (Note: This contract requires shipment of commercial items in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations); or

(C) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

(c) The Contractor and its subcontractors may request that the Contracting Officer authorize shipment in foreign-flag vessels, or designate available U.S.-flag vessels, if the Contractor or a subcontractor believes that—

(1) U.S.-flag vessels are not available for timely shipment;

(2) The freight charges are inordinately excessive or unreasonable; or

(3) Freight charges are higher than charges to private persons for transportation of like goods.

(d) The Contractor must submit any request for use of foreign-flag vessels in writing to the Contracting Officer at least 45 days prior to the sailing date necessary to meet its delivery schedules. The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, but the Contracting Officer's failure to grant approvals to meet the shipper's sailing date will not of itself constitute a compensable delay under this or any other clause of this contract. Requests shall contain at a minimum—

(1) Type, weight, and cube of cargo;

(2) Required shipping date;

(3) Special handling and discharge requirements;

(4) Loading and discharge points;
(5) Name of shipper and consignee;
(6) Prime contract number; and
(7) A documented description of efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag carriers contacted. Copies of telephone notes, telegraphic and facsimile message or letters will be sufficient for this purpose.

(e) The Contractor shall, within 30 days after each shipment covered by this clause, provide the Contracting Officer and the Maritime Administration, Office of Cargo Preference, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, one copy of the rated on board vessel operating carrier's ocean bill of lading, which shall contain the following information:

(1) Prime contract number;
(2) Name of vessel;
(3) Vessel flag of registry;
(4) Date of loading;
(5) Port of loading;
(6) Port of final discharge;
(7) Description of commodity;
(8) Gross weight in pounds and cubic feet if available;
(9) Total ocean freight in U.S. dollars; and
(10) Name of steamship company.

(f) If this contract exceeds the simplified acquisition threshold, the Contractor shall provide with its final invoice under this contract a representation that to the best of its knowledge and belief—

(1) No ocean transportation was used in the performance of this contract;

(2) Ocean transportation was used and only U.S.-flag vessels were used for all ocean shipments under the contract;

(3) Ocean transportation was used, and the Contractor had the written consent of the Contracting Officer for all foreign-flag ocean transportation; or

(4) Ocean transportation was used and some or all of the shipments were made on foreign-flag vessels without the written consent of the Contracting Officer. The Contractor shall describe these shipments in the following format:

	Item description	Contract line items	Quantity
TOTAL			

(g) If this contract exceeds the simplified acquisition threshold and the final invoice does not include the required representation, the Government will reject and return it to the Contractor as an improper invoice for the purposes of the Prompt Payment clause of this contract. In the event there has been unauthorized use of foreign flag vessels in the performance of this contract, the Contracting Officer is entitled to equitably adjust the contract, based on the unauthorized use.

(h) In the award of subcontracts for the types of supplies described in paragraph (b)(2) of this clause, including subcontracts for commercial items, the Contractor shall flow down the requirements of this clause as follows:

(1) The Contractor shall insert the substance of this clause, including this paragraph (h), in subcontracts that exceed the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(2) The Contractor shall insert the substance of paragraphs (a) through (e) of this clause, and this paragraph (h), in subcontracts that are at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(End of clause)

Alternate II. As prescribed in 247.574(b)(3), use the following clause, which uses a different paragraph (b) than the basic clause.

TRANSPORTATION OF SUPPLIES BY SEA—ALTERNATE II (APR 2014)

(a) *Definitions.* As used in this clause—

Components means articles, materials, and supplies incorporated directly into end products at any level of manufacture, fabrication, or assembly by the Contractor or any subcontractor.

Department of Defense (DoD) means the Army, Navy, Air Force, Marine Corps, and defense agencies.

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Ocean transportation means any transportation aboard a ship, vessel, boat, barge, or ferry through international waters.

Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

Supplies means all property, except land and interests in land, that is clearly identifiable for eventual use by or owned by the DoD at the time of transportation by sea.

(i) An item is clearly identifiable for eventual use by the DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

(ii) *Supplies* includes (but is not limited to) public works; buildings and facilities; ships; floating equipment and vessels of every character, type, and description, with parts, subassemblies, accessories, and equipment; machine tools; material; equipment; stores of all kinds; end items; construction materials; and components of the foregoing.

U.S.-flag vessel means a vessel of the United States or belonging to the United States, including any vessel registered or having national status under the laws of the United States.

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract.

(2) A subcontractor transporting supplies by sea under this contract shall use U.S.-flag vessels if the supplies being transported are—

(i) Noncommercial items; or

(ii) Commercial items that—

(A) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it subcontracts for f.o.b. destination shipment);

(B) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations; or

(C) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643 (Note: This contract requires transportation of commissary or exchange cargoes outside of the Defense Transportation System in accordance with 10 U.S.C. 2643).

(c) The Contractor and its subcontractors may request that the Contracting Officer authorize shipment in foreign flag vessels, or designate available U.S. flag vessels, if the Contractor or a subcontractor believes that

(1) U.S. flag vessels are not available for timely shipment;

(2) The freight charges are inordinately excessive or unreasonable; or

(3) Freight charges are higher than charges to private persons for transportation of like goods.

(d) The Contractor must submit any request for use of foreign-flag vessels in writing to the Contracting Officer at least 45 days prior to the sailing date necessary to meet its delivery schedules. The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, but the Contracting Officer's failure to grant approvals to meet the shipper's sailing date will not of itself constitute a compensable delay under this or any other clause of this contract. Requests shall contain at a minimum—

(1) Type, weight, and cube of cargo;
(2) Required shipping date;
(3) Special handling and discharge requirements;
(4) Loading and discharge points;
(5) Name of shipper and consignee;
(6) Prime contract number; and
(7) A documented description of efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag carriers contacted. Copies of telephone notes, telegraphic and facsimile message or letters will be sufficient for this purpose.

(e) The Contractor shall, within 30 days after each shipment covered by this clause, provide the Contracting Officer and the Maritime Administration, Office of Cargo Preference, U.S. Department of Transportation, 400 Seventh Street SW.,

Washington, DC 20590, one copy of the rated on board vessel operating carrier's ocean bill of lading, which shall contain the following information:

(1) Prime contract number;
(2) Name of vessel;
(3) Vessel flag of registry;
(4) Date of loading;
(5) Port of loading;
(6) Port of final discharge;
(7) Description of commodity;
(8) Gross weight in pounds and cubic feet if available;
(9) Total ocean freight in U.S. dollars; and
(10) Name of steamship company.

(f) If this contract exceeds the simplified acquisition threshold, the Contractor shall provide with its final invoice under this contract a representation that to the best of its knowledge and belief—

(1) No ocean transportation was used in the performance of this contract;

(2) Ocean transportation was used and only U.S.-flag vessels were used for all ocean shipments under the contract;

(3) Ocean transportation was used, and the Contractor had the written consent of the Contracting Officer for all foreign-flag ocean transportation; or

(4) Ocean transportation was used and some or all of the shipments were made on foreign-flag vessels without the written consent of the Contracting Officer. The Contractor shall describe these shipments in the following format:

	Item description	Contract line items	Quantity
TOTAL			

(g) If this contract exceeds the simplified acquisition threshold and the final invoice does not include the required representation, the Government will reject and return it to the Contractor as an improper invoice for the purposes of the Prompt Payment clause of this contract. In the event there has been unauthorized use of foreign-flag vessels in the performance of this contract, the Contracting Officer is entitled to equitably adjust the contract, based on the unauthorized use.

(h) In the award of subcontracts for the types of supplies described in paragraph (b)(2) of this clause, including subcontracts for commercial items, the Contractor shall flow down the requirements of this clause as follows:

(1) The Contractor shall insert the substance of this clause, including this paragraph (h), in subcontracts that exceed the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(2) The Contractor shall insert the substance of paragraphs (a) through (e) of this clause, and this paragraph (h), in subcontracts that are at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(End of clause)

[FR Doc. 2014–08855 Filed 4–18–14; 8:45 am]
BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750–AI18

Defense Federal Acquisition Regulation Supplement: Photovoltaic Devices (DFARS Case 2014–D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify rules of origin under trade agreements for photovoltaic devices to be utilized under covered DoD contracts, as required by a section of the National Defense Authorization Act for Fiscal Year 2011.

DATES: Effective April 21, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 78 FR 76993 on December 20, 2013, to clarify rules of origin under trade agreements for photovoltaic devices to be utilized under covered DoD contracts, as required by a section of the National Defense Authorization Act for Fiscal Year 2011. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule. The interim rule was converted to a final rule without change. The one comment received related to performance of a net zero green house gas analysis, and was outside the scope of the rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule will only have an impact on the determination of whether photovoltaic devices are substantially transformed in a designated country. No domestic entities will be impacted because the United States is not a designated country. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35); however, these changes to the DFARS do not impose additional information

collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0229, entitled Defense Federal Acquisition Regulation Supplement (DFARS); Part 225, Foreign Acquisition.

List of Subjects in 48 CFR Part 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR part 252, which was published at 78 FR 76993 on December 20, 2013, is adopted as a final rule without change.

[FR Doc. 2014–08859 Filed 4–18–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750–AI02

Defense Federal Acquisition Regulation Supplement: Clauses With Alternates—Contract Financing (DFARS Case 2013–D014)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) as part of a project to review clauses with alternates to create basic and alternate clauses structured in a manner to facilitate use of automated contract writing systems. This final rule addresses a contract financing clause.

DATES: Effective April 21, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Annette Gray, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 78 FR 48404 on August 8, 2013, to amend the DFARS to revise the presentation in the DFARS of a part 232 contract financing clause with an alternate. The rule also proposed to add a separate prescription for the basic clause as well as the alternate. No public comments were submitted in response to the proposed rule.

II. Discussion

This final rule addresses the single DFARS part 232 clause that has an alternate, 252.232–7007, Limitation of Government's Obligation. In developing the final rule, DoD determined that the need for an alternate to the basic clause could be eliminated by making a minor change to paragraph (a) of the basic clause. The only difference between the basic clause and the alternate is the number of line items subject to incremental funding, which is information inserted by the contracting officer into paragraph (a) of the basic clause or the alternate clause. In the final rule, the alternate clause is being eliminated in its entirety as a result of an editorial change made to paragraph (a) of the basic clause. This change enables the contracting officer to tailor and use the basic clause, whether a single line item or multiple line items are being incrementally funded.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been performed and is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.232–7007, Limitation of Government's Obligation. Paragraph (a) of clause 252.232–7007 is being modified to be used for single or multiple line items that are to be incrementally funded. The modification of paragraph (a) in the basic clause eliminates the need for an alternate clause; therefore the alternate clause is removed by this final rule.

The public did not raise any issues in response to the initial regulatory flexibility analysis. The Chief Counsel for Advocacy of the Small Business Administration did not submit any comments in response to the rule.

Potential offerors, including small businesses, may be affected by this rule by seeing an unfamiliar format for this part 232 clause. According to the Federal Procurement Data System, in fiscal year 2012, DoD made approximately 270,000 contract awards (not including modification and orders) that exceeded the micro-purchase threshold, of which approximately 180,000 (67%) were awarded to small businesses. It is unknown how many of these contracts were awarded that included incremental funding. Nothing substantive will change in solicitations or contracts for potential offerors. The overall burden caused by this rule is expected to be negligible, and will not be any greater on small businesses than it is on large businesses.

This rule does not add any new information collection requirements. No alternatives were identified that will accomplish the objectives of the rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 252.232–7007 by—

■ a. Removing the clause date "(MAY 2006)" and adding "(APR 2014)" in its place;

■ b. Revising paragraph (a); and

■ c. Removing Alternate I.

The revision reads as follows.

252.232–7007 Limitation of Government's obligation.

* * * * *

(a) Contract line item(s) *[Contracting Officer insert after negotiations]* is/are incrementally funded. For this/these item(s), the sum of $ *[Contracting Officer insert after negotiations]* of the total price is presently available for payment and allotted

to this contract. An allotment schedule is set forth in paragraph (j) of this clause.

* * * * *

[FR Doc. 2014–08856 Filed 4–18–14; 8:45 am]

BILLING CODE 5001–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 648 and 697

[Docket No. 130319263–4284–03]

RIN 0648–BD09

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Final Rule To Allow Northeast Multispecies Sector Vessels Access to Year-Round Closed Areas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule finalizes an interim final rule approving a sector exemption request that allows Northeast multispecies (groundfish) sector vessels restricted access to portions of the Nantucket Lightship Closed Area under standard monitoring coverage levels. This action also responds to public comments received on the interim measures. This final rule does not modify any measures from the interim final rule.

DATES: Effective April 21, 2014, we confirm the effective date of December 31, 2013 through April 30, 2014, of the interim final rule published on December 16, 2013 (78 FR 76077).

ADDRESSES: A copy of the accompanying environmental assessment is available from the NMFS Greater Atlantic Regional Fisheries Office: John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, phone (978) 281–9182, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

Framework Adjustment 48 to the Northeast Multispecies (groundfish) Fishery Management Plan (78 FR 26118; May 3, 2013), included a provision allowing sectors to request exemptions from the year-round groundfish mortality closures to provide additional fishing opportunities. On December 16, 2013 (78 FR 76077), NMFS published an interim final rule allowing groundfish sector vessels restricted access to the Eastern and Western Exemption Areas within the Nantucket Lightship Closed Area. The interim final rule modified monitoring requirements for vessels fishing in the Eastern and Western Exemption Areas from the proposed rule by reducing the 100-percent industry-funded at-sea monitoring requirement for these areas to current at-sea monitoring coverage levels. The interim final rule also disapproved sector vessel access to Closed Areas I and II. This final rule retains the measures implemented in the interim final rule and responds to comments received on the interim final rule.

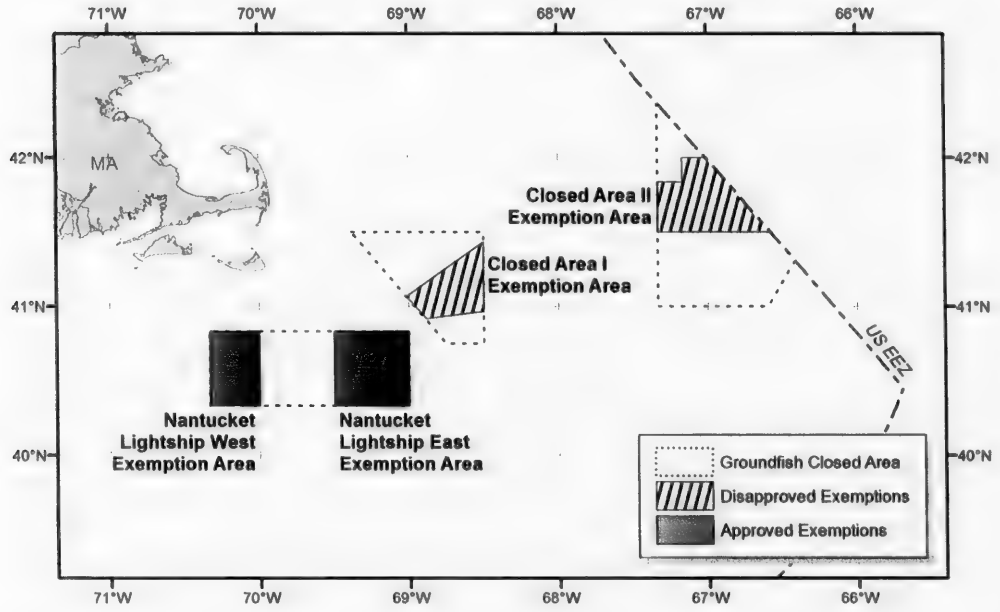
Approval of an Exemption Request Allowing Sector Vessels Into Portions of Nantucket

Lightship Closed Area

This final rule allows sector vessels to fish with selective gear in the Eastern and Western Exemption Areas within the Nantucket Lightship Closed Area for the duration of fishing year 2013, i.e., through April 30, 2014 (see Figure A). Justification for this decision is explained in the interim final rule (78 FR 76077; December 13, 2013). Trawl vessels are restricted to using selective trawl gear, including the separator trawl, the Ruhle trawl, the mini Ruhle trawl, rope trawl, and any other gear authorized by the New England Fishery Management Council (Council) in a management action. Flounder nets are prohibited in this area. Hook vessels are permitted and gillnet vessels are restricted to fishing 10-inch (25.4-cm) diamond mesh or larger. Gillnet vessels are required to use pingers when fishing in the Western Exemption Area from December 1–May 31, because this area lies within the existing Southern New England Management Area of the Harbor Porpoise Take Reduction Plan. It should be noted that the proposed rule to approve 2014 Sector Operations Plans and exemption requests (79 FR 14639; March 17, 2014) proposes to allow standard otter trawls in the Western Exemption Area for the 2014 fishing year. The interim final rule modified the monitoring requirements for vessels fishing in the Eastern and Western Exemption Areas by reducing the at-sea monitoring coverage level. There are several reasons why we reduced the coverage level to be consistent with standard coverage levels outside of the closed areas. The coverage level was relaxed from the proposed 100-percent industry-funded level because we recognized that there were fewer risks with opening the Nantucket Lightship Closed Area given that this area was originally closed to protect Southern New England/Mid-Atlantic yellowtail flounder and this stock is no longer overfished or undergoing overfishing. We also required selective gear to be used in this area that further reduced the potential for groundfish catch. Because we did not open Closed Areas I and II, and because we do not anticipate an increase in fishing effort after opening the Eastern and Western Exemption Areas, we expect to be able to fund the standard level of monitoring coverage in these areas. This provides increased flexibility for sector vessels because vessels can fish in a new area with no additional monitoring costs in fishing year 2013.

This final rule maintains the 22 percent monitoring coverage requirement for the Eastern and Western Exemption Areas for the remainder of fishing year 2013.

Figure A – Approved and Disapproved Sector Exemptions for Closed Area Access for Fishing Year 2013



Disapproval of Exemption Requests To Fish in Portions of Closed Areas I and II

Although we considered allowing access to fish in portions of Closed Areas I and II in the proposed rule, in the interim final rule we did not approve sector exemption requests that would allow sector vessels to fish in those areas. We disapproved access for the reasons summarized below. Comments in response to the interim final rule do not provide us with justification to revise our decision.

Our proposal to allow access to these areas was based on a balance of potential economic opportunity and increased efficiency with cost effective monitoring and fish stock protections. In our interim final rule, we disapproved sector exemption requests to access portions of Closed Areas I and II for several reasons. Comments on the proposed rule submitted by some industry members and environmental organizations indicated that the increase in catch rates from Closed Areas I and II would likely not exceed the increased expense of having to pay for an at-sea monitor on board. Further, all comments submitted by the fishing industry claimed that they were unwilling to pay for the necessary monitoring coverage in any of the closure openings. Because of this and our concern about the potential impacts from opening these closed areas on Georges Bank cod and yellowtail flounder (stocks are both overfished and subject to overfishing), it did not seem prudent to open these areas.

Lastly, the action proposed to allow sector groundfish vessels into Closed Areas I and II until December 31, 2013. The deadline was imposed to protect spawning Georges Bank cod and haddock. Because that time has since passed, there is no possibility of opening the areas following the interim final rule.

Future Access Into Closed Areas

In fishing year 2014, we remain unable to fund monitoring costs for exemptions requiring a 100 percent at sea monitor coverage level. We explained in the interim final rule that we are interested in gathering additional data from Closed Areas I and II through exempted fishing permits to determine if this coverage level can be reduced. As a result, we are working with the Northeast Fisheries Science Center (Center) to develop a short-term exempted fishing permit (EFP) that would allow a small number of groundfish trips into Closed Areas I and II using the Center's Study Fleet vessels. For more information on the Study Fleet, visit *http://www.nefsc.noaa.gov/read/popdy/studyfleet/*. We have also received an industry-led EFP request to access portions of Closed Areas I and II, which we are currently evaluating and discussing with the applicants. Results from these and any other potential EFPs could better inform the industry, public, and NMFS, regarding the economic efficacy of accessing Closed Areas I and II, while providing needed information concerning bycatch of groundfish stocks of concern. This information could then help industry determine if it is economically worthwhile to request access to these areas in the future (via a sector exemption request). It will also help the Center determine whether it may be practicable to allow a limited number of observed vessels to fish in Closed Areas I and II. For the reasons stated in the interim final rule, we have concerns with providing access to these areas with less than 100% coverage; however, we intend to evaluate results from any approved EFPs to determine if we could justify access at a less than 100-percent at-sea monitor coverage level.

Comments and Responses

Comments on the interim final rule were submitted by the Northeast Seafood Coalition, the Georges Bank Cod Fixed Gear Sector, and the Massachusetts Division of Marine Fisheries. The Northeast Seafood Coalition and the Massachusetts

Division of Marine Fisheries commented primarily on our justifications for disapproving industry access into Closed Areas I and II. They also commented on our rationale for requiring 100-percent industry-funded at-sea monitoring when accessing those areas. Further, they both argued that our decision reveals a lack of trust in fishermen and confidence in the sector management system. The Massachusetts Division of Marine Fisheries requested clarification on comments we made about the catchability of Georges Bank haddock and suggested developing a pilot research program that is not scientifically focused. The Georges Bank Cod Fixed Gear Sector commented that vessels fishing in the Eastern and Western portions of the Nantucket Lightship Closed Area should only be subject to the 8 percent observer coverage provided by the Northeast Fisheries Observer Program.

Comment 1: The Northeast Seafood Coalition contends that the rationale for denying sector vessels access to Closed Area I and II appears to be based on "subjective fears and speculation with little or no real scientific or analytical evidence to support the decision."

Response: We analyzed general sector exemption requests from year-round closed area exemption requests separately in fishing year 2013, and developed a specific Environmental Assessment (EA) for this action so that we could better analyze the exemptions and potential costs and benefits that may result from opening these closed areas. The closed area access EA utilized and expanded upon data developed for the Framework Adjustment 48 EA. The EA included recent analyses developed by the New England Fishery Management Council's Closed Area Technical Team to incorporate the best available science. We utilized a variety of analyses including, but not limited to; habitat assessments using the Swept Area Seabed Impact (SASI) model, catch per unit effort comparisons inside and outside of closed areas, species distribution maps, species length and frequency comparisons inside and outside of closed areas, and standard and selective gear performance inside and outside of closed areas.

Conclusions in the EA revealed relatively weak incentives for fishing inside Closed Areas I and II. The cumulative effects analysis suggests that opening the closed areas as proposed could *likely* result in low positive impacts to human communities, while resulting in impacts ranging between low negative to negligible to the physical and biological environments (see Table 44 in the Environmental Assessment). Because we relied on these analyses, we disagree that the basis for denial was speculative and not based on real scientific or analytical evidence.

We acknowledge that there is some uncertainty in the analyses within the EA, but this is why we took more of a precautionary approach when considering access to closed areas. For reasons discussed in the interim final rule (78 FR 76077, page 76079) we consider it necessary that every trip in Closed Area I or II be monitored to ensure that we are able to closely monitor catch in a timely fashion and can rescind the exemption if it is determined that the catch could be detrimental to rebuilding efforts. There was strong opposition to this by many members of the fishing industry who commented that they would not utilize the exemptions if they had to pay for monitoring coverage. Yet there was some support for comprehensive monitoring by several industry groups, as well as members of environmental organizations.

Our proposal to allow access to Closed Areas I and II was based on a balance of potential economic opportunity and efficiency with cost effective monitoring and fish stock protections. Industry's insistence that they would not fish in Closed Areas I and II if they had to pay for a monitor reduced any speculation we had about the potential benefit of opening the area. It further convinced us that without more information about the catch available in these areas, opening Closed Areas I and II was not worth the potential environmental risks. Comments on the interim final rule submitted by the Massachusetts Division of Marine Fisheries support this conclusion.

As explained above, we are developing an exempted fishing permit program to gain additional information on potential environmental impacts and the economic viability of fishing in Closed Areas I and II. The findings from this research could help provide industry with better catch information for potential future trips into Closed Areas I and II.

Comment 2: Both the Northeast Seafood Coalition and Massachusetts Division of Marine Fisheries argue that our response and rationale for disapproving access to Closed Areas I and II suggests that we lack confidence in the output control system (i.e., an annual catch limit) that sectors are held to.

Response: Groundfish are not managed solely through an output control/hard quota system. While Amendment 16 to the groundfish plan implemented annual catch limits for sectors and accountability measure, should those limits be exceeded, the fishery is also managed through area closures that protect essential fish habitat and spawning aggregations.

The groundfish mortality closures that this action considered granting exemptions from were established to protect stocks, such as Georges Bank cod and yellowtail flounder, that are currently overfished and subject to overfishing. We do not believe that it is appropriate at this time to increase fishing efforts in areas where these stocks reside without catch information from monitoring every trip. The upcoming Omnibus Habitat Amendment 2 is reconsidering which areas should be closed to protect essential fish habitat and juvenile groundfish. Until that amendment is implemented, we will continue to utilize approved closed areas as necessary to meet the goals and objectives of the groundfish plan.

As explained in the response to Comment 26 in the interim final rule, sector vessels are not exceeding their allocations, yet many key groundfish stocks are struggling to rebuild. We do not lack confidence in the sector system; however, we do believe that additional measures, such as closed areas to further protect juvenile and spawning fish, are vital to help rebuild overfished groundfish stocks.

Comment 3: The Northeast Seafood Coalition contends that NMFS has shown a "clear prejudice" against fishermen's ability to target fish and fish lawfully. While commending our concerns about the potential for illegal discarding, Massachusetts Division of Marine Fisheries questions the need for 100-percent monitoring coverage inside Closed Areas I and II when substantially less coverage is required outside.

Response: Comment 18 of the interim final rule (78 FR 76077, page 76085) explains why we consider additional coverage necessary for these closed areas. We also re-summarized above that it is important to closely monitor catch so that we can react appropriately if unanticipated, negative impacts on fish stocks occur. We assert that trips into areas that have been closed to groundfish fishing for two decades should be closely monitored, at least for an initial time period. We disagree that requiring greater monitoring shows prejudice against fishermen. In fact, many comments submitted by the fishing industry, such as the Cape Cod Commercial Fishermen's Alliance, Penobscot East Resource Center, and Maine Coast Fishermen's Association,

supported our requirement for 100-percent monitoring coverage.

Because these areas have not been fished by groundfish fishermen for decades, fishermen have little recent experience or knowledge of where fish are located and how many fish could be there. A higher uncertainty in this area could result in unanticipated catches. It is not prejudicial, only appropriately cautious, to consider that the mixing of potentially large George Bank haddock catches, with very low quotas for Georges Bank cod and yellowtail flounder, could potentially result in an increased incentive to illegally discard in these areas.

Comment 4: The Northeast Seafood Coalition claims that the actions by NMFS are opposite of the Council's intent.

Response: Similar comments on the proposed rule are addressed in Comment 19 in the interim final rule (78 FR 76077, page 76086). In summary, the Council elected through Framework 48 to allow sectors to request access to year round groundfish closed areas through the sector exemption process. NMFS approved this action and agreed during the development of Framework 48 that we would consider such exemption requests. NMFS, not the Council, develops and reviews sector exemptions. The Regional Administrator has the authority to consider, approve/disapprove, and modify sector exemption requests to ensure that the exemptions are consistent with the Magnuson-Stevens Act National Standards and the groundfish plan's goals and objectives. We completed an extensive analysis of the sectors request to access the year round closed areas and found that the potential costs exceeded the benefits of opening Closed Areas I and II.

Comment 5: The Northeast Seafood Coalition contends that we could have allowed vessels to better harvest their remaining allocations of Georges Bank cod and yellowtail flounder by letting vessels fish in Closed Areas I and II. They argue that allowing vessels into those areas would have allowed them to better target Georges Bank haddock, pollock, and redfish without having to worry about bycatch of choke stocks such as American plaice and witch flounder.

Response: We initially proposed access to Closed Areas I and II to do exactly as the Northeast Seafood Coalition suggests. This action was developed to provide sector vessels with the opportunity to access Closed Areas I and II to increase their Georges Bank haddock catch. However, because of the need to monitor catch on each trip in near real-time, along with a lack of historical catch data, every trip needed to be monitored. After explaining that we could not pay for the additional monitoring coverage, industry responded that they would not fish in the closed areas because the benefits would not exceed the monitoring costs. As a result, we did not open Closed Areas I and II.

Comment 6: The Northeast Seafood Coalition suggests that a decrease in fishing effort for the 2013 fishing year should result in a surplus of monitoring funds that could be used to cover fishing trips into Closed Areas I and II.

Response: Currently, staff from the Science Center are still analyzing SBRM sea day needs and target coverage rates to meet the required mandates for catch monitoring and the SBRM, and identifying available resources. We are unable to determine whether there is a surplus of monitoring funds at this time.

Second, access for Closed Areas I and II was only proposed until December 31, 2013, rendering this comment moot.

Comment 7: Massachusetts Division of Marine Fisheries requested that we clarify our position on haddock abundance and why access to Closed Areas I and II will not give fishermen needed opportunities to catch more of the allocation and optimum yield.

Response: In the interim final rule, we explained that current low catches of haddock, along with some fishermen commenting that they are having a difficult time catching Georges Bank haddock, suggests that "opening Closed Areas I and II would not lead to significant increases in haddock catch."

As of March 4, 2014, only 8.7 percent of the Georges Bank East haddock quota has been landed, and 7.8 percent of the Georges Bank West haddock quota has been landed, with only two months remaining in fishing year 2013. This means that there are plenty of haddock that remain uncaught. If a significantly larger portion of haddock were available in the portions of Closed Areas I and II that we had proposed to open, surely the increased revenue from the catch would have offset the expense of having a monitor on board. The Massachusetts Division of Marine Fisheries agreed with this rationale within its comments. This conclusion is also supported by the EA for this action, which did not find a statistically significant larger amount of haddock within the portions of Closed Areas I and II that we were considering opening, during the time period we were proposing (see the swept area analyses in section 4.1.2 as well as the economic impacts in section 5.1.5). The EA concluded that access to these areas would *likely* result in *low* positive impacts to fishermen and fishing communities.

Massachusetts Division of Marine Fisheries said that we based our "decision on a likely lack of haddock" in the closed areas. This is incorrect. Fishermen having a difficult time harvesting haddock was only one of several reasons why we did not allow fishermen into Closed Areas I and II. Other reasons include potential impacts on Georges Bank cod and yellowtail flounder stocks as well as a lack of economic opportunity and increased efficiency evidenced by industry's willingness to pay for monitoring coverage for trips into closed areas.

It is a stretch to claim that a low catch rate of Georges Bank haddock raises concerns about the status of the haddock quota—there could be other factors limiting the fleet's ability to harvest more of the Georges Bank haddock quota. For example, increased fuel expenses to fish offshore, high lease rates for choke stocks that could be necessary to harvest the haddock, or possibly the movement of fish further offshore into Canadian waters. One could also argue that it does not make sense for fishermen to pay for a monitor so they can fish inside a closed area when they can fish immediately adjacent to the area for free.

Comment 8: Massachusetts Division of Marine Fisheries suggested that tying a specific research requirement to special access into a closed area through an exempted fishing permit would prevent timely access and unnecessarily complicate matters.

Response: We agree. We expect that any type of scientific assessment would take at least one year so that we could analyze and incorporate seasonal changes. As explained earlier, we are developing an exempted fishing permit program that would allow for a limited number of trips so that industry could then determine whether or not they could afford to pay for a monitor while fishing in the area. Data would also be reviewed to ensure that opening the area would not have a negative impact on Georges Bank cod or yellowtail flounder.

Comment 9: The Georges Bank Cod Fixed Gear Sector contends that requiring the standard level of monitoring coverage (currently 22 percent) is unnecessary when vessels are fishing selectively in the eastern and western portions of the Nantucket Lightship Closed Area.

Response: While we understand the point that the Sector is trying to make, selective gear is required in the area because groundfish are present. In fact, some sectors have requested the

exemption so that they can target haddock with selective trawl gear. Because this is relatively new fishing effort in the areas, it is appropriate to keep the standard monitoring coverage level at this time.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Northeast Multispecies Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order E.O. 12866.

Pursuant to the Regulatory Flexibility Act, and prior to the Small Business Administration's (SBA) June 20, 2013, final rule, a Final Regulatory Flexibility Analysis (FRFA) was prepared for this action, as required by section 604 of the Regulatory Flexibility Act, as part of the regulatory impact review. This analysis used SBA's former size standards. The FRFA describes the economic impact the interim rule would have on small entities. In the interim final rule, we determined that the new size standards did not affect the previously completed IRFA. Each of the statutory requirements of section 604(b) and (c) were addressed in the Classification section of the interim final rule. NMFS did not receive any comments on the FRFA during the comment period for the interim final rule, nor did it make any changes to the provisions implemented in the interim final rule. Therefore, no changes are necessary to the FRFA that was published with the interim final rule.

A small entity compliance guide for the interim measure, as required by Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, was issued on December 12, 2013. This final rule makes no changes to the interim final rule. Therefore, NMFS is not re-issuing the previously distributed compliance guide. Small entities have been operating under the interim measure since December 31, 2013, so redistributing the previously issued compliance guide would likely result in confusion. A small entity compliance guide was sent to all holders of Federal groundfish permits that are enrolled in a groundfish sector. In addition, copies of this final rule and guides (i.e., information bulletins) are available from NMFS (see **ADDRESSES**) and at the following Web site: *http://www.nero.noaa.gov/.*

Accordingly, the interim rule amending 50 CFR Parts 648 and 697 which was published at 78 FR 76077 on December 16, 2013, is adopted as a final rule without change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 15, 2014.

Paul N. Doremus,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 2014–09031 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 79, No. 76
Monday, April 21, 2014

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 112

[Docket No. APHIS–2011–0049]

RIN 0579–AD64

Viruses, Serums, Toxins, and Analogous Products; Single Label Claim for Veterinary Biological Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the Virus-Serum-Toxin Act regulations to provide for the use of a simpler labeling format that would better communicate product performance to the user. We intend to replace the current label format, which reflects any of four different levels of effectiveness, with a single, uniform label format. We are also proposing to require biologics licensees to provide a standardized summary, with confidential business information removed, of the efficacy and safety data submitted to the Animal and Plant Health Inspection Service in support of the issuance of a full product license or conditional license. A simpler label format along with publicly available safety and efficacy data will help biologics producers to more clearly communicate product performance to their customers.

DATES: We will consider all comments that we receive on or before June 20, 2014.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0049-0009.*
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS–2011–0049, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0049* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Malloy, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road, Unit 148, Riverdale, MD 20737–1231; (301) 851–3426.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) administers and enforces the Virus-Serum-Toxin Act, as amended (21 U.S.C. 151–159). The regulations issued pursuant to the Act are intended to ensure that veterinary biological products are pure, safe, potent, and efficacious when used according to label instruction. The regulations in 9 CFR part 112, "Packaging and Labeling," (referred to below as the regulations) prescribe requirements for the packaging and labeling of veterinary biologics. The regulations ensure that labeling provides adequate information concerning the proper use and safety of the product, including vaccination schedules, warnings, and cautions.

Current APHIS guidelines provide examples of label claims that may be used to reflect the expected performance of the product provided that appropriate efficacy data has been submitted and approved by APHIS. The guidelines describe performance requirements and allowable indications statements for four different levels (tiers) of effectiveness.

In July 2009, representatives of veterinary biologics manufacturers and the American Veterinary Medical Association (AVMA) met with APHIS to discuss the Agency's current labeling guidance and to explore the possibility of developing a single indications statement that would convey clinically useful information to veterinary practitioners and other consumers of veterinary biologics. At that meeting, the AVMA, which represents the largest group of consumers of veterinary biologics, informed APHIS that its members consider labeling indications statements based on the current guidance to be confusing, and expressed a desire for indications statements to provide insight into the actual performance of the product, including summaries of safety and efficacy data.

On the other hand, representatives of the trade associations representing veterinary biologics manufacturers have remarked that their members expend significant resources on studies to provide data to support labeling that includes indications statements emphasizing the unique properties of their product versus that of a competitor. They expressed concern about any change to the labeling regulations that would de-emphasize product differences or require public disclosure of proprietary information that could compromise a manufacturer's competitive position in the marketplace.

In response to the concerns expressed by these stakeholders, APHIS developed a draft guideline (concept paper) concerning the effectiveness indications statements used in veterinary biologics labeling. The draft guideline would replace current indications statements that may reflect any of four different levels of effectiveness with a single indications statement (e.g., a label claim stating that the product can be used "as an aid in the prevention of _____," "as an aid in the control of _____," "for the prevention of infection with _____," or "for the prevention of disease due to _____" would be replaced with the statement "This product has been shown to be effective for the vaccination of healthy animals _____ weeks of age or older against _____").

In addition to a standardized indications statement, the draft guideline would also require biologics licensees to provide a summary of their data, with confidential business information removed, of the efficacy and safety data submitted to APHIS in support of the issuance of the product license. These proposed changes would not alter the current efficacy requirements for veterinary biological products and are not intended to

constitute re-licensure of currently licensed products. These changes would not apply to diagnostic products.

On May 24, 2011, we published in the **Federal Register** (76 FR 30093–30094, Docket No. APHIS–2011–0049) a notice of a public meeting to discuss the draft guideline (concept paper) concerning effectiveness indications statements in veterinary biologics labeling. At the meeting, we received comments from national trade associations representing veterinary biologics manufacturers, the AVMA, a veterinary consulting group, private and academic veterinarians, pet owners, and manufacturers. There was general support to change the format in which expectations of product efficacy are communicated on labels. APHIS has carefully considered the comments received on the draft guideline and has taken these comments into account in the drafting of this proposed rule.

Currently licensed products would not need to be re-licensed based on these proposed changes. This proposal is not intended to change the efficacy requirements for currently licensed veterinary biological products. Disease syndromes and primary parameters used in the case definitions would continue to be included in the indications statement where appropriate.

The licensees would be required to provide the same data as is currently required under 9 CFR part 102. Summaries of these data will be made available to the public on the APHIS Center for Veterinary Biologics (CVB) Web site. We believe that providing safety and efficacy data combined with a simpler labeling format will allow the end user to better assess product performance.

For the purposes of marketing, promotion, or advertising, the manufacturers could include a statement on promotional and advertising materials referring the user to the CVB Web site where additional efficacy and safety data may be found. Promotional studies would not be disclosed on the CVB Web site. We believe this is consistent with previous guidelines and regulations and would not confer an advantage to any particular manufacturer.

The CVB Web site would also provide educational information to address the complex nature of efficacy studies as well as explanatory statistical information, where appropriate, related to individual data summaries. In addition, the Web site would include a statement advising users to consult with a licensed veterinarian for further information regarding the use of a veterinary biological product. We believe an educational component is an integral part of disseminating such complex information as efficacy and safety data.

Biologics licensees would be responsible for providing data summaries with confidential business information removed. The licensee would be required to submit a summary of data with the efficacy/safety reports. If after reviewing the summary of data APHIS disagrees with the accompanying conclusions, APHIS would revise the summary and provide the licensee with the opportunity to review and comment on the revised summary prior to it being posted on the CVB Web site.

The original efficacy and safety data for each component antigen in a product would remain on the Web site indefinitely. Post-licensure data supporting additional efficacy/safety claims, or changes in the time immunity is demonstrated (i.e., time interval between vaccination and challenge) would also be posted to the Web site alongside the original data summary. We believe that providing post-licensure efficacy and safety data alongside the original efficacy data would allow the end user to determine whether the manufacturer is maintaining, increasing, or decreasing the standards used to originally license the product.

Several commenters requested information regarding how study design and results would be disclosed on the data summaries. Given the large number of diseases, vaccine types, and efficacy models, it is not possible to standardize the study design for all efficacy studies. Efficacy data summaries would include information regarding study design and associated raw data used to license the product. Parameters associated with study design would include: Minimum and maximum age of the target species; the diversity of target species; number of animals; whether animals were client owned; States where the study was conducted; serologic status of animals (including presence or absence of maternal antibody when appropriate); and dosage, timing, and route of administration. Information regarding the challenge organism would include the name of the organism (not strain) and concentration, time of challenge relative to the last vaccination, and whether the challenge organism is homologous or heterologous to the vaccine. Safety data summaries would include the same study design information as provided in efficacy data summaries and would include all adverse events that were observed throughout the course of the study.

The primary outcome and clinically relevant outcomes of the study used for acceptance of the data by APHIS would have to be provided. The data summary would include neither case definitions nor statistical results of an inferential nature (e.g., confidence intervals and p-values). The data would be sufficient to be reasonably understood by an individual with basic medical and scientific background yet contain sufficient information to allow a veterinarian to make an informed decision regarding the performance of the product(s). If the clinical sign is quantified rather than defined as either present or absent, the summary would provide sufficient information so the distribution of the responses could be understood. For example, in addition to the number of control and vaccinated animals with lung lesions, the summary could include such information as minimum, 25th percentile, median, 75th percentile, and maximum percent lung lesions for each group. We believe that presentation of efficacy and safety information as outlined above would appropriately reflect product performance in a standardized format without disclosing study information that may be confidential business information.

After demonstrating the efficacy for a product that contains a combination of many antigens, the manufacturer often mixes those antigens into smaller combinations. Smaller combinations can then be licensed as fall out products. With regard to the presentation of data for large combination products with fall out products, in general, efficacy and safety studies are conducted on the largest combination product and not on fall out products. Efficacy would have to be established for each component antigen in the largest combination product. Safety data summaries would have to be provided for the largest combination product. Efficacy data summaries would be posted for each component antigen on the large combination (parent) product with a list of all smaller fall out products. Similarly, each fall out product from a larger combination product would have to reference the parent product under which the efficacy data summary may be found. An educational component would be included on the efficacy and safety data summaries clarifying that fall-out products have been licensed based on efficacy and safety data of a larger combination product. We believe this would bridge data from larger combination products to their associated fall-out products. In order to provide a manageable workload for both the manufacturers and CVB, we will

provide manufacturers with the opportunity to prioritize the submission of product families.

Products that are not yet licensed but are within 6 months of licensure at the time these proposed regulations may become effective would be expected to be fully compliant no later than 1 year after licensure. Products that are more than 6 months away from licensure at the time these proposed regulations may become effective would be expected to be fully compliant at the time of licensure.

For products that are currently licensed, the standardized summary of efficacy and safety data and the revised labels would have to be submitted to APHIS within 4 years of the time these proposed regulations may become effective. Licensees could request an extension of up to 2 years for submitting these materials. Extension requests, which would have to include the reason for the extension and a proposed implementation schedule, would have to be submitted in writing to the CVB Director. Contact information for the Director can be found on the CVB Web site.

Products whose original efficacy data are not available would require a statement on their data summary stating "Original efficacy data is not available because the product was licensed "x" years ago." Regardless of the date of licensure of the product, any additional efficacy claims, including new routes of administration, or reference qualification data involving vaccination challenge studies would be posted to the Web site. We believe that these timelines are appropriate for implementation of this proposed action and do not unnecessarily pose a hardship on the regulated industry or CVB.

Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also provides an initial regulatory flexibility analysis that examines the potential economic effects of this rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule. Further, we are interested in receiving information that could be used to further quantify the benefits of this proposed rule.

APHIS is proposing to amend the Virus Serum Toxin Act regulations to require the use of a simpler labeling format. This simpler uniform format would allow biologics licensees and permittees to more clearly communicate product performance to the user. Biologics licensees and permittees would also be required to provide a standardized summary of the efficacy and safety data that are submitted to APHIS in support of the issuance of a full product license or conditional product license. The summary of efficacy and safety data would be made available to the public on the APHIS CVB Web site. We believe that the benefits of this rule justify the costs.

A simpler, uniform format would allow biologics licensees and permittees to more clearly communicate product performance information to the end user. Veterinarians, the largest group of consumers of veterinary biologics, often find labeling indications statements based on the current guidance to be confusing, and have expressed a desire for indications statements to provide insight into the actual performance of the product, including summaries of safety and efficacy data. In addition, the rule would simplify the evaluation of efficacy studies, focusing on a basic claim of effectiveness compared to the more complex, tiered approach historically used by APHIS. The proposed rule would reduce the amount of time required by CVB to evaluate study data. Because complex claims require more complex studies, the rule would likely result in fewer studies being found unacceptable. A study that is determined to be unacceptable by APHIS can lead to significant costs to manufacturers. These costs include those associated with duplication of efforts and materials (facilities and animals) used when a study must be redone, and lost marketing opportunities when initial licensing applications are not approved. A novel veterinary biological product can generate revenue in the neighborhood of $5 to $10 million per year. Therefore, lost opportunities due to delays in bringing a product to market can be significant.

This rule would affect all veterinary biologics licensees and permittees. There are approximately 98 veterinary biological establishments, including permittees. These companies produce about 1,900 different products, and there are about 11,700 active approved labels for veterinary biologics. There were about 3,100 labels submitted for approval in the last 12 months by about two-thirds of the companies.

Costs for licensees and permittees of the proposed rule are not expected to be significant, whether the affected entity is small or large. APHIS anticipates that the only costs associated with the proposed labeling format would be one time costs incurred by licensees and permittees in having labels for existing licensed products reformatted in accordance with the proposed rule. Most biologics companies, in the course of normal business, use a just in time method for producing new labels and readily alter their content. Labels are regularly altered, for example, to enhance marketing through changes in design.

Products that are not yet licensed but are within 6 months of licensure at the time these proposed regulations may become effective would be expected to be fully compliant no later than 1 year after licensure. Products that are more than 6 months away from licensure at the time these proposed regulations may become effective would be expected to be fully compliant at the time of licensure. For products that are currently licensed, the standardized summary of efficacy and safety data and the revised labels would have to be submitted to APHIS within 4 years of the time these proposed regulations may become effective. CVB would consider written requests to extend the time

period for submitting the summaries by an additional 2 years if necessary.

In many instances manufacturers would not have to produce new labeling materials before they would do so in the normal course of business, and would only incur additional administrative costs to track the changes. Costs incurred for minor label changes that are coordinated with planned label changes are estimated to range between $99 and $500 per product with labels needing to be changed. We estimate that there are about 6,200 labels associated with about 1,000 products for which there would be this type of coordinated change. For these label changes, the total cost is estimated to range between $99,000 and $500,000.

We expect that about 5,500 of the active labels, associated with 900 products, would be changed other than in conjunction with a planned change. In these cases, manufacturers would incur costs for prepress, graphic design, and printing in addition to administrative costs. All labels for a specific product would be changed at the same time. Based on these activities, the costs of minor label changes that are not coordinated with planned label changes could range from $465 to $1,613 in administrative and labor costs for each product with labels needing to be changed and from $100 to $275 per new label in materials cost. Because veterinary biologics manufacturers are likely to make changes for groups of products, all cattle products for example, there are likely to be savings in administrative and labor costs for those grouped changes. However, based on the above ranges, the total cost for these uncoordinated label changes is estimated to be between $968,000 and $3 million.

Minor costs may be incurred in producing the standardized summaries of efficacy and safety data for currently licensed products within the 4-year implementation period. We estimate that about 1,700 summaries would need to be completed as a result of this rule because efficacy and safety studies are frequently provided for multiple products. The estimated cost would be about $55 per summary, or about $94,000 in total.

Executive Order 12372

This program is listed in the category of Federal Domestic Assistance under No 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. The Virus-Serum-Toxin Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

This proposed rule contains no new information or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 112

Animal biologics, Exports, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR part 112 as follows:

PART 112—PACKAGING AND LABELING

■ 1. The authority citation for part 112 continues to read as follows:

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 112.2 is amended as follows:

■ a. In paragraph (a)(5), by adding a new first sentence.

■ b. By adding a new paragraph (a)(9)(v).

The additions read as follows:

§ 112.2 Final container label, carton label, and enclosure.

(a) * * *

(5) An indications statement to read "This product has been shown to be effective for the vaccination of healthy animals _____ weeks of age or older against _____." * * *

* * * * * *

(9) * * *

(v) A statement similar to "For more information regarding efficacy and safety data, go to *http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth?1dmy&urile=wcm%3apath%3a%2FAPHIS_Content_Library%2FSA_Our_Focus%2FSA_Animal_Health%2FSA_Vet_Biologics.*"

* * * * * *

■ 3. Section 112.5 is amended as follows:

■ a. In the introductory text, by removing the words "paragraph (c) of this section and under the master label system provided in paragraph (d)" and adding the words "paragraph (d) of this section and under the master label system provided in paragraph (e)" in their place.

■ b. By redesignating paragraphs (b) through (g) as paragraphs (c) through (h).

■ c. By adding a new paragraph (b).

■ d. In newly redesignated paragraph (d)(1), by removing the citation "§ 112.5(d)" and adding the citation "§ 112.5(e)" in its place.

■ e. In newly redesignated paragraph (e)(1)(ii), by removing the citation "§ 112.5(d)(1)(iii)" and adding the citation "§ 112.5(e)(1)(iii)" in its place.

■ f. In newly redesignated paragraph (e)(1)(iii), by removing the citation "§ 112.5(d)(1)(i)" and adding the citation "§ 112.5(e)(1)(i)" in its place.

■ g. In newly redesignated paragraph (e)(1)(iv), by removing the citation "§ 112.5(d)(1)(ii)" and adding the citation "§ 112.5(e)(1)(ii)" in its place.

■ h. In newly redesignated paragraph (h), by removing the citation "§ 112.5(c)" and adding the citation "112.5(d)" in its place.

The addition reads as follows:

§ 112.5 Review and approval of labeling.

* * * * * *

(b) A data summary, available on the Internet at *http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth?1dmy&urile=wcm%3apath%3a%2FAPHIS_Content_Library%2FSA_Our_Focus%2FSA_Animal_Health%2FSA_Vet_Biologics,* shall be used with each submission of efficacy and safety data in support of a label claim. Manufacturers will submit the efficacy and safety data information with either the efficacy and safety studies or at the time of label submission. This information will be posted at *http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth?1dmy&urile=wcm%3apath%3a%2FAPHIS_Content_Library%2FSA_Our_Focus%2FSA_Animal_Health%2FSA_Vet_Biologics* to allow public disclosure of product performance.

* * * * * *

Done in Washington, DC, this 21st day of March 2014.

Gary Woodward,

Deputy Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2014–08995 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 391

[Docket No. FSIS–2013–0022]

RIN 0583–AD

Change in Accredited Laboratory Fees

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend its regulations to change the fees it charges for the accreditation and the maintenance of accreditation of non Federal laboratories for the FSIS Accredited Lab Program (ALP). Currently, the Agency charges a flat annual fee of $5,000 for each accreditation or maintenance of accreditation. Laboratories that participate in FSIS' ALP can receive accreditation in one to six analyte classes. FSIS is proposing to charge laboratories $5,000 per year for the first analyte class accreditation or maintenance (as it currently does), but to reduce the charges to $2,900 per year for the second, and $2,100 per year for each additional analyte class accreditation or maintenance of accreditation.

DATES: Submit comments on or before June 20, 2014.

ADDRESSES: FSIS invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Room Manager, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163B, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to Docket Room Manager, Patriots Plaza 3, 355 E. Street SW., Room 8–163B, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2013–0022. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Charles Williams, Room 6065, South Building, 1400 Independence Avenue SW., Washington, DC 20250; Phone: (202) 720–5627, Email: *charles.williams@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

FSIS has been delegated the authority to exercise the functions of the Secretary of Agriculture (7 CFR 2.18, 2.53) as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). FSIS protects the public by verifying that meat and poultry products are wholesome, not adulterated, and properly marked, labeled, and packaged.

In addition, under the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (7 U.S.C. 138–138i), FSIS has authority to accredit non-Federal laboratories. The accreditation allows non-Federal laboratories to conduct analyses of official regulatory meat and poultry samples. One provision (7 U.S.C. 138f) requires that a laboratory seeking accreditation under the 1990 Act or under the FMIA or PPIA pay a non-refundable accreditation fee to cover the costs of the Accredited Laboratory Program.

Laboratory Accreditation Fees

FSIS is proposing to amend 9 CFR 391.5(a) to change the fee structure for the accreditation and the maintenance of the accreditation of laboratories for the FSIS Accredited Laboratory Program (ALP).

Currently, FSIS charges each laboratory a flat annual fee of $5,000 per accreditation or maintenance of accreditation. A laboratory may apply for FSIS accreditation and maintenance of accreditation in one to six analyte classes: Food Chemistry, chlorinated hydrocarbons (CHCs), polychlorinated biphenyls (PCBs), arsenic, nitrosamines, and sulfonamides. FSIS charges laboratories the flat rate of $5,000 for each accreditation obtained regardless of the type or the number of accreditations. A laboratory accredited for all six analyte classes is charged a total fee of $30,000. FSIS bills annually for the services it provides the laboratories, which includes the cost of FSIS auditing non-Federal laboratories, conducting periodic proficiency test sample studies, on-site review, maintenance of accreditation (includes analyzing proficiency test results and documentation) and other additional costs.

The Agency has determined that the costs to the Accredited Laboratory Program can be reduced when laboratories apply for multiple accreditations. Most of the cost to the Agency in conducting the ALP is in travel and administering sample studies to determine laboratory proficiency.

FSIS is proposing a sliding scale for accreditations and the maintenance of accreditations after payment of the base fee of $5,000 for the first accreditation that a laboratory receives. Under the proposal, the Agency would charge laboratories $5,000 per year for the first analyte class accreditation or maintenance of accreditation, $2,900 per year for the second, and $2,100 per year for each additional analyte class accreditation or maintenance of accreditation.

The Agency is proposing a fee of $2,900 [1] for the second accreditation because FSIS staff can review multiple accreditations (different analyte classes) for the same laboratory in one trip. FSIS is proposing $2,100 [2] for the third, fourth, fifth, and sixth accreditations because, when a laboratory has three or more accreditations, some of the instrument types and chemical processes are similar. This fact means that the review will be less labor intensive. FSIS has determined that the proposed costs to participants in the accredited laboratory program will cover the cost to the Agency for the administration of the program. The proposed costs are included below in Table 1 and are based on available FSIS laboratory and personnel cost data.

[1] Source: FSIS, OPHS, LQAS, Accredited Laboratory Program.

[2] Ibid.

TABLE 1—PROPOSED ALP FEE SCHEDULE

Item	Accreditations		
	1	2	3–6
Auditing of non-Federal Laboratories	$2,546	$816	$408
Proficiency Tests	1,237	1,237	1,237
Maintenance of Accreditation	918	536	153
Additional Costs	347	347	347
Total	5,048	2,936	2,145
Rounded Total	5,000	2,900	2,100

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a "non-significant" regulatory action under section 3(f) of Executive Order (E.O.) 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget under E.O. 12866.

Baseline

The FSIS Accredited Laboratory Program, (ALP) is voluntary and charges a non-refundable accreditation fee. Currently, the annual fee is $5,000 per accreditation (Table 2). As discussed above, FSIS is proposing to reduce fees after the first accreditation. Table 2 below compares current fees to proposed fees.

TABLE 2—CURRENT AND PROPOSED ACCREDITATION FEE SCHEDULE

Accreditation	Current	Proposed
	Accreditation lab fee	Accreditation lab fee
First	$5,000	$5,000
Second	5,000	2,900
Third–Sixth	5,000	2,100

Currently, there are 53 laboratories accredited for 60 activities.[3] Most (42 out of 53) laboratories are accredited for food chemistry. There are 13 laboratories accredited for CHCs and five laboratories for PCBs. Only five of the 53 laboratories are accredited for more than one analyte. These laboratories are accredited for 2–3 analytes. The analysis below assumes laboratories will keep the same number of accreditations under the new fee structure.

Expected Cost of the Proposed Rule

For the purposes of this analysis, FSIS considers the pre- and post-rule cost to the industry. They are shown in table 3 below. The cost to the industry will fall from $300,000 per year to $283,700 per year.

TABLE 3—EXPECTED ANNUAL COSTS PRE- AND POST-RULE

Number of analyte classes	Pre rule		Post rule	
	Number labs	Industry cost	Number labs	Industry cost
1	48	$240,000	48	$240,000
2	3	[4] 30,000	3	[5] 23,700
3	2	30,000	2	20,000
	53	300,000	53	283,700

Expected Benefits of the Proposed Rule

The benefit accrued to the industry is equivalent to current accreditation costs minus the proposed accreditation costs which incorporate the proposed efficiencies outlined in the preamble.

[3] FSIS, OPHS, LQAS, Accredited Laboratory Program

[4] Calculation: Total Cost = (Accreditation 1 Cost * Number of Laboratories) + (Accreditation 2 Cost * Number of Laboratories) = ($5,000 * 3) + ($5,000 * 3).

[5] Calculation: Total Cost = (Accreditation 1 Cost * Number of Laboratories) + (Accreditation 2 Cost * Number of Laboratories) = ($5,000 * 3) + ($2,900 * 3).

The proposed rule will benefit the lab industry by offering a sliding accreditation fee schedule. The lower cost is a result of leveraging efficiencies in the current accreditation process that will allow the industry to realize cost savings if they increase the number of accreditations. Under the current accreditation fee schedule, the total industry cost is estimated as $300,000 ($300,000 = 60 Accreditations × $5,000) (Table 3). Should the proposed rule be finalized, the total industry cost would be $283,700, a net benefit of $16,300 ($300,000 − $283,700 = $16,300). If the total number of accreditations remains unchanged, the present value of total industry net benefit due to the proposed rule (Table 4), adjusted with 3% inflation rate for 10 years is $139,000, resulting in an annualized expected benefit of $16,295.

TABLE 4—SUMMARY OF COSTS AND BENEFITS

Current costs (FY13)	Proposed costs (FY14)	Proposed benefits	Net benefits (10 years, 3%)
$ 300,000	$283,700	$16,300	$139,000

Regulatory Flexibility Analysis

The FSIS Administrator has made a preliminary determination that this proposed rule would not have a significant economic impact on a substantial number of small entities in the United States, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act

FSIS has reviewed this rule under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and has determined that there is no information collection related to this proposed rule.

E-Government Act

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other things, promoting the use of the Internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under this proposed rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted, (2) no retroactive effect will be given to this rule, and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule.

Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this proposed regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY).

Additional Public Notification

FSIS will announce this proposed rule online through the FSIS Web page located at *http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/federal-register.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects in 9 CFR Part 391

Fees and charges.

For the reasons discussed in the preamble, FSIS is proposing to amend 9 CFR Chapter III as follows:

PART 391—FEES AND CHARGES FOR INSPECTION AND LABORATORY ACCREDITATION

■ 1. The authority citation for part 391 continues to read as follows:

Authority: 7 U.S.C. 138f, 7 U.S.C. 1622, 1627, and 2219a; 21 U.S.C. 451 *et seq.;* 21 U.S.C. 601–695; 7 CFR 2.18 and 2.53.

■ 2. In § 391.5 revise paragraph (a) to read as follows:

§ 391.5 Laboratory accreditation fee.

■ (a) The annual fee for the accreditation and maintenance of accreditation provided pursuant to § 439.5 of this chapter shall be $5,000 for the first analyte class, $2,900 for the second analyte class, and $2,100 for each additional analyte class.

* * * * *

Done at Washington, DC, on: March 24, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–08962 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–DM–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket No. PRM–51–30; NRC–2014–0014]

Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; acceptance and docketing.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has received a petition for rulemaking (PRM) from Diane Curran on behalf of 34 environmental organizations (the petitioner), dated December 20, 2013, as corrected on January 7, 2014. The petitioner requests that the NRC revise and integrate all regulations that relate to the environmental impacts of spent fuel storage and disposal. The NRC is not instituting a public comment period for this PRM at this time.

DATES: The PRM is available on April 21, 2014.

ADDRESSES: Please refer to Docket ID NRC–2014–0014 when contacting the NRC about the availability of information for this petition. You may access publicly-available information related to this petition using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0014. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search*." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852.

FOR FURTHER INFORMATION CONTACT: Keith McDaniel, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5252, email: *Keith.McDaniel@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. The Petitioner

Diane Curran, Harmon, Curran, Spielberg & Eisenberg, L.L.P., on behalf of 34 Environmental Organizations submitted a PRM dated December 20, 2013, as corrected on January 7, 2014 (ADAMS Accession Nos. ML14029A124, ML14029A169, and ML14029A154). The PRM is part of a larger document entitled "Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal" (Petitioners' Document). Primarily, the Petitioners' Document constitutes the collective comments of these 34 environmental organizations on the NRC's draft "Waste Confidence Generic Environmental Impact Statement," NUREG–2157 (78 FR 56621; September 13, 2013), and associated proposed waste confidence rulemaking (78 FR 56776; September 13, 2013). Section II of the Petitioners' Document, "Description of Organizations," states that "[a]ll of the organizations are neighbors of existing or proposed nuclear power plants, and most have either intervened or plan to intervene in NRC proceedings for the licensing or re-licensing of nuclear power plants." [1]

II. The Petition

The petitioner requests that the NRC revise and integrate all regulations that relate to the environmental impacts of spent fuel storage and disposal. The petitioner asserts that

> [i]ssues related to spent fuel storage and disposal impacts are now balkanized into separate rulemakings for spent fuel disposal impacts (Table S–3), safety and impacts of spent fuel storage and disposal from fuel generated during the license renewal period (Table B–1), safety and impacts of spent fuel storage after license termination (proposed 10 C.F.R. [Title 10 of the *Code of Federal Regulations*] § 51.23), and safety and feasibility of siting a spent fuel repository (proposed 10 C.F.R. § 51.23).[2]

The petitioner further asserts that the "NRC has divided consideration of environmental impacts into piecemeal decision-making" and, "[b]y considering them separately, the NRC ignores the interaction of impacts, cumulative impacts, and inconsistencies in safety and environmental analyses conducted in the separate decision-making processes." [3] The petitioner requests that the NRC conduct a comprehensive review of these regulations and environmental studies, revise them to be consistent with the current state of knowledge, and integrate them into one cohesive regulatory framework in order to comply with the National Environmental Policy Act (NEPA).

Section IX of the Petitioners' Document, "Petition for Rulemaking," lists five NRC regulations that must be "revised and integrated," namely, 10 CFR 51.23, "Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact;" [4] 10 CFR 51.51, "Uranium fuel cycle environmental data—Table S–3;" [5] 10 CFR 51.53(c), "Postconstruction environmental reports;" [6] 10 CFR 51.71(d), "Draft environmental impact statement—contents;" [7] and Table B–1 of Appendix B to Subpart A of 10 CFR Part 51, "Environmental Effect of Renewing the Operating License of a Nuclear Power Plant." [8]

The complete text of the Petitioners' Document, as corrected (ADAMS Accession Nos. ML14029A124, ML14029A169, and ML14029A154), is available for review as described in the **ADDRESSES** section of this document.

Because the petitioner has satisfied the acceptance criteria in in 10 CFR 2.802, "Petition for rulemaking," the NRC has accepted, and will review the PRM to determine whether it should be considered in the rulemaking process. The NRC staff is currently reviewing the public comments on the draft Waste Confidence Generic Environmental

[1] Petitioners' Document at 5.

[2] *Id.*

[3] *Id.*

[4] Section 51.23 is the primary NRC regulation being considered for amendment in the proposed waste confidence rulemaking (78 FR 56776, 56804; September 13, 2013).

[5] Table S–3 is entitled "Table of Uranium fuel Cycle Environmental Data." Although Section IX of the Petitioners' Document refers only to "Table S–3," Table S–3 is part of 10 CFR 51.51.

[6] Paragraph 51.53(c) concerns environmental reports filed by nuclear power plant licensees seeking renewal of a plant's operating license.

[7] Paragraph 51.71(d) concerns the analysis the NRC must engage in when preparing a draft environmental impact statement.

[8] Table B–1 is entitled, "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants." Table B–1 codifies the findings of the NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants," NUREG–1437, Revision 1 (June 2013).

Impact Statement and the proposed waste confidence rulemaking. The NRC staff will consider any insights gained from this review when analyzing the issues raised in PRM–51–30.

The NRC is not requesting public comment on the PRM at this time.

Dated at Rockville, Maryland, this 15th day of April, 2014.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2014–09026 Filed 4–18–14; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 390

RIN 3064–AE08

Regulations Transferred From Office of Thrift Savings and Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") proposes to rescind and remove regulations transferred from the Office of Thrift Savings ("OTS"), and amend its rules of practice and procedure in ways that will ensure that all insured depository institutions, for which the FDIC is the appropriate Federal banking agency ("FBA"), are subject to the same substantive and procedural rules governing administrative hearings.

DATES: Comments must be received on or before June 20, 2014.

ADDRESSES: You may submit comments by any of the following methods:

- *FDIC Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the agency Web site.
- *FDIC Email: Comments@fdic.gov.* Include RIN 3064–AE08 on the subject line of the message.
- *FDIC Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1–877–275–3342 or 1–703–562–2200.

FOR FURTHER INFORMATION CONTACT: Scott Patterson, Senior Review Examiner, Division of Risk Management Supervision, (202) 898–6953, Andrea Winkler, Supervisory Counsel, Legal Division, (202) 898–3727; Heather Walters, Counsel, Legal Division, (202) 898–6729.

SUPPLEMENTARY INFORMATION: In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation ("FDIC") proposes to rescind and remove from the Code of Federal Regulations 12 CFR part 390, subparts B, C, D, and E as redundant of existing uniform rules of practice and procedure applicable to administrative hearings. These subparts were included in the regulations that were transferred to the FDIC from the Office of Thrift Savings (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act"). With few exceptions addressed below, the requirements for State savings associations in Part 390, subparts B through E are substantively similar to those in FDIC's 12 CFR part 308, subparts A, B, C, K, and N. The FDIC further proposes to amend 12 CFR part 308, subparts A, B, C, K, and N, to modify the scope of the rules to include State savings associations and to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency for those institutions. Additionally, the FDIC proposes to modify these regulations in minor ways that will ensure that all insured depository institutions, for which the FDIC is the appropriate Federal banking agency ("FBA"), are subject to the same substantive and procedural rules governing administrative hearings.

I. Part 308 Amendments

A. Background

The Dodd-Frank Act provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by Section 311 of the Dodd-Frank Act, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency ("OCC"), as to Federal savings associations, and the Board of Governors of the Federal Reserve System ("FRB"), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.[1]

Although Section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the FDI Act and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of "appropriate Federal banking agency" contained in Section 3(q) of the FDI Act, 12 U.S.C.

[1] 76 FR 39247 (July 6, 2011).

1813(q), to add State savings associations to the list of entities for which the FDIC is designated as the "appropriate Federal banking agency." As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, as well as for State nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.[2] When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS regulations into other FDIC regulations, amending them, or rescinding them, as appropriate.

B. Summary of the Amendments

Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") required the FDIC, the FRB, the OCC, the OTS, and the National Credit Union Association ("NCUA") to adopt joint uniform rules of practice and procedures and "local rules" that govern administrative hearings. Since August 1991, the FDIC has been operating under uniform rules set forth at 12 CFR part 308, subpart A, 12 CFR 308.1–308.41, as well as its own set of "local rules" set forth at 12 CFR part 308, subpart B, 12 CFR 308.101-308.107. The FDIC proposes to amend part 308, subparts A, B, C, K, and N to make several technical and conforming changes to expand the scope of the rules and procedures to include enforcement actions brought against State savings associations under additional statutory authority transferred from the OTS.

FDIC's Existing 12 CFR Part 308, Subpart A—Uniform Rules of Practice and Procedure

Part 308, subpart A contains the uniform rules of procedure agreed to and followed by all of the Federal banking agencies. The FDIC presented these proposed changes to the OCC, the FRB, and the NCUA and none of the agencies objected to the proposed revisions to subpart A.

Section 308.1: As presently written, section 308.1 sets the broad parameters of what types of enforcement actions are covered by the Uniform Rules. We propose minor conforming amendments to provide the FDIC with the authority to seek civil money penalties against State savings associations for violations of various laws such as the Federal Reserve Board Act, 12 U.S.C. 1468, and certain sections of the Home Owners' Loan Act, 12 U.S.C. 1464 ("HOLA").

Section 308.3: As presently written, section 308.3 defines the terms used in the Uniform Rules. The proposed amendments include a new definition of "Investigation" to provide the FDIC with authority to investigate State savings associations under HOLA that was previously under OTS authority. Certain amendments will also clarify and update terms such as "Designee", remove references to the OTS, and also correct a few technical errors in statutory and regulatory citation.

Section 308.25: As presently written, section 308.25 addresses document discovery in enforcement actions covered by the Administrative Procedure Act. We propose to correct a technical citation error.

Former OTS's 12 CFR Part 509, Subparts A and B (Transferred to FDIC's Part 390, Subpart C)

The OTS's rules of practice and procedure for adjudicatory proceedings, formerly found at 12 CFR part 509, subparts A and B, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart C. Subpart C contains both the OTS's uniform rules and local rules. After careful review and comparison of the OTS rules that were transferred to 12 CFR part 390, subpart C to the FDIC's uniform and local rules, this proposed revision rescinds part 390, subpart C, because it essentially duplicates the uniform rules. To the extent that the OTS local rules contained in subpart C differed from the FDIC's local rules, those changes are discussed below in part 308, subpart B.

Moreover, it is important that all insured depository institutions for which the FDIC is the appropriate Federal banking agency are subject to the same substantive and procedural rules governing administrative hearings. Rescinding part 390, subpart C will streamline the FDIC's rules and eliminate unnecessary regulations. Therefore, this proposed revision recinds 12 CFR part 390, subpart C it its entirety.

FDIC's Existing 12 CFR Part 308, Subpart B—General Rules of Procedure

Section 308.101: As presently written, section 308.101(a) sets the scope of the Local Rules and makes clear that the rules contained in subpart A, "Uniform Rules," and subpart B "Local Rules" do not apply to subparts D through P of part 308 unless specifically provided. We propose to correct a technical citation error. We also propose a new subsection 308.101(d) to provide the FDIC with the authority to seek civil money penalties against State savings associations for violations of the Exchange Act, 15 U.S.C. 78o(c).

Section 308.107: As presently written, section 308.107 restricts discovery in administrative enforcement proceedings to document discovery only. We propose to correct an internal technical citation error.

Former OTS's 12 CFR Part 509, Subparts A and B (Transferred to FDIC's Part 390, Subpart C)

The OTS's rules of practice and procedure for adjudicatory proceedings, formerly found at 12 CFR part 509, subparts A and B, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart C. Subpart C contains both the OTS's uniform rules and local rules. In contrast to the FDIC local rules, the OTS local rules permitted additional discovery procedures such as depositions and had formal provisions pertaining to certain post-hearing motions and extensions of time. FDIC staff found that additional discovery procedures permitted by the OTS local rules were not necessary or appropriate. The OTS local rules also contained two provisions that formalized post-hearing procedures. The FDIC generally follows these practices when needed, but relies on the informal broad discretion of the Board and/or the Administrative Law Judge to make the appropriate rulings. After careful review and comparison of transferred OTS local rules at 12 CF part 390, subpart C to the FDIC's local rules, this proposed revision rescinds part 390, subpart C in its entirety. Rescinding part 390, subpart C will streamline the FDIC's rules and eliminate unnecessary regulations.

FDIC's Existing 12 CFR Part 308, Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

Section 308.109: As presently written, section 308.109(b) sets forth the requirements for mandatory suspension and debarment. Subsection 308.109(b)(2) proposes adding language requiring attorneys who wish to appear

[2] 76 FR 47652 (Aug. 5, 2011).

before the FDIC as legal counsel to disclose any professional disciplinary actions so that the Board can determine whether counsel is fit to represent individuals in an administrative proceeding.

Former OTS's 12 CFR Part 513 (Transferred to FDIC's Part 390, Subpart E)

The OTS rules for practice before the FDIC, formerly found at 12 CFR part 513, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart E. Subpart E is repetitive of the FDIC's rules of practice before the FDIC and standards of conduct found at 12 CFR part 308, subpart C, and certain of the FDIC's uniform rules found at 12 CFR part 308, subpart A. After a careful review and comparison, this proposed revision rescinds part 390, subpart E in its entirety because it is repetitive of part 308, subparts A and C.

FDIC's Existing 12 CFR Part 308, Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

This subpart K covers rules applicable to the FDIC's formal investigations. We proposed changing the title of this Subpart to reflect additional authority under HOLA transferred from the OTS.

Section 308.144: As presently written, section 308.144 sets the scope of investigations covered by the subpart. We propose revisions to this subsection to include additional statutory authority applicable to State savings associations.

Section 308.145: As presently written, section 308.145 covers the conduct and approval of formal investigations. We propose technical changes to cover investigations under HOLA and to reflect the FDIC's current internal organization.

Section 308.146: As presently written, section 308.146 sets forth the powers of the person conducting the investigation. We propose a technical change to cover investigations under HOLA and to clarify conduct standards for counsel participating in the investigation.

Section 308.147: As presently written, section 308.147 protects the confidentiality of investigations. We propose a technical change to ensure the confidentiality of investigations under HOLA.

Section 308.148: As presently written, section 308.148 covers the rights of witnesses participating in a formal investigation. We propose a technical change to include witnesses in a HOLA investigation. Additionally, we propose language clarifying that counsel does not have the right to attend formal testimony if they are not personally representing the witness. This is also to ensure the confidentiality of the investigation.

Section 308.150: As presently written, section 308.150 covers transcripts of sworn testimony. We propose a technical change to clarify that a witness must submit a written request to obtain a transcript of his or her testimony.

Former OTS's 12 CFR Part 512 (Transferred to FDIC's Part 390, Subpart D)

The OTS rules for investigative proceedings and formal examination proceedings, formerly found at 12 CFR part 512, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart D. Part 390, subpart D governed the OTS's procedures for conducting its formal investigations under section 10(c) of the FDI Act, 12 U.S.C. 1820(c). After a careful review and comparison of 12 CFR part 390, subpart D, and the FDIC's analogous regulation, 12 CFR part 308, subpart K, this proposed revision rescinds part 390, subpart D in full because it is substantially duplicative of part 308, subpart K. To the extent that there were minor differences in the OTS versions those minor changes are reflected in the amendments to part 308, subpart K described above.

FDIC's Existing 12 CFR Part 308, Subpart N—Rules and Procedures Applicable To Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Section 308.161: As presently written, section 308.161 covers the scope of the rules applicable when a felony is charged. We propose a technical change to subsection 308.161(a) to include institution-affiliated parties ("IAPs") of State savings institutions.

Section 308.163: As presently written, section 308.163 relates to the notice of suspension, removal, or prohibition. We propose changes to paragraph 308.163(a)(2) to clarify that the suspension or prohibition under this subpart N is effective immediately. We propose further changes to paragraph 308.163(c) to clarify the effect of service of the notice and the content of the notice. We also propose a new paragraph 308.163(d) and to clarify certain rights and obligations of IAPs in regards to requesting a hearing and the content of any response to the notice.

Section 308.164: As presently written, section 308.164 covers hearing procedures under this subpart N. We propose changes to paragraph 308.164(b)(3) to clarify the right to an oral argument and to paragraph 308.164(b)(5) to provide a transcript of the hearing to the presiding officer. We also propose a new paragraph 308.164(10) to clarify that the IAP has the burden of demonstrating that the IAP's continued participation in the banking industry does not pose a threat to depository institutions.

Former OTS's 12 CFR Part 508 (Transferred to FDIC's Part 390, Subpart B)

Former part 508 of the OTS regulations, 12 CFR part 508, addressed removals, suspensions, and prohibitions where a crime is charged or proven. The regulation was transferred to the FDIC with only nominal changes and republished as subpart B of 12 CFR part 390. After a careful review and comparison of 12 CFR part 390, subpart B, and the FDIC's analogous regulation, 12 CFR part 308, and the proposed changes to part 308, subpart N described above, this proposed revision rescinds part 390, subpart B in full because it is substantially duplicative of part 308, subpart N.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(b)(3), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 390, subparts B through E, the FDIC, as the appropriate federal banking agency for State savings associations, proposes to rescind part 390, subparts B through E in their entirety. The FDIC also proposes to amend part 308, subparts A, B, C, K, and N to make several technical and conforming changes as described below.

A. Changes to Subpart A—Uniform Rules of Practice and Procedure

Section 308.1 Scope: In section 308.1(e)(1) the phrase "or 12 U.S.C. 1468" is added at the end of the sentence to add authority to seek civil money penalties against State savings associations for violations of Sections 23A and 23B of the Federal Reserve Board Act, 12 U.S.C. 1468. Additionally, in section 308.1(e)(9) after "FDIC" the phrase "or the former Office of Thrift Supervision (OTS)" is inserted. Finally, three new paragraphs are proposed to include additional authority for State savings associations at 308.1(e) by inserting new sections to cover Sections 5, 9, and 10 of the Home Owners' Loan

Act (HOLA), pursuant to 12 U.S.C. 1464(d), 1467(d), and1467a.

Section 308.3 Definitions: In section 308.3(e) to simplify the term "Designee", the phrase at the end of the subsection "as provided in 12 CFR part 303 of this chapter or by specific resolution of the Board of Directors" would be stricken. To correct a technical error in section 308.3(j) the term "Institution" should refer to the statutory citation at the end of the subsection "12 U.S.C. 1467a(a)." A new section 308.3(l) would be added to define "Investigation" stating "*Investigation* means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B))." In section 308.3(m), we propose deleting the phrase "the Office of Thrift Supervision ("OTS")". In section 308.3(q), we propose a technical correction to the "Uniform Rules" term by deleting "§ 308.01" and inserting "§ 308.1". Finally, the subsections 308.3(l) through 308.3(r) would be renumbered to accommodate the new section 308.3(l).

Section 308.25 Request for document discovery from parties: As presently written, § 308.25 "Request for document discovery from parties", addressed document discovery in enforcement actions covered by the Administrative Procedure Act. In section 308.25(b), "Production or copying" we propose to correct a technical citation error by deleting "part 310" and inserting "part 309".

B. Changes to Subpart B—General Rules of Procedure

Section 308.101 Scope of Local Rules

In section 308.101(a), we propose a technical correction to the internal citation by deleting "§ 308.01" and inserting "§ 308.1". We also propose a new subsection with the following language "(d) Subparts A, B, and C prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4))."

Section 308.107 Document Discovery

In subsection 308.107(a), we propose a technical correction to the internal citation that deletes "§ 308.01" and inserts "§ 308.1".

C. Changes to Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

Section 308.109 Suspension and Disbarment

In subsection 308.109(b)(2), we propose adding the following language immediately before the last sentence "Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made."

D. Changes to Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

We propose changing the title of this subpart K to add "and Section 5(d)(1)(B) of HOLA" at the end.

Section 308.144 Scope

We propose adding "or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B))" immediately following the phrase "pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c))".

Section 308.145 Conduct of Investigation

We propose striking the first sentence and inserting the following sentence, "An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees."

Section 308.146 Powers of Person Conduction Investigation

In the first sentence, after "conduct" insert "the" and strike the phrase immediately following "a section 10(c)". Additionally, in the second to last sentence in the paragraph, we propose replacing the phrase "been guilty of" with "engaged in" as well as inserting the phrase "dilatory, obstructionist, or contumacious" before "conduct". Similarly, after "conduct" we propose adding the phrase "or has otherwise violated any provision of this part during the course of an investigation."

Section 308.147 Investigations Confidential

We propose striking the phrase "conducted pursuant to section 10(c)" from the first sentence.

Section 308.148 Rights of Witnesses

We propose striking the phrase "pursuant to section 10(c)" from the opening sentence. In paragraph 308.148(c), we suggest adding the following sentence at the end "Neither attorney(s) for the institution that is the subject of the investigation, nor attorney(s) for any other interested persons, shall have any right to be present during the testimony of any witness not personally represented by such attorney;".

Section 308.150 Transcripts

In subsection 308.150(a) *General rule,* we propose striking the phrase "in an investigation pursuant to section 10(c)" in the first sentence. We further propose inserting the phrase "that the witness submits a written request for the transcript and" after "provided" and before "the transcript" in the second to last sentence.

E. Changes to Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Section 308.161 Scope

In paragraph 308.161(a), in the first sentence after the phrase "of an insured state nonmember bank, or", we propose to insert the phrase "an insured state savings association, or".

Section 308.163 Notice of Suspension or Prohibition, and Orders of Removal or Prohibition

In paragraph 308.163(a)(2), in the first sentence after the phrase "institution-affiliated party", we propose to insert "who shall immediately comply with the requirements thereof,". In paragraph 308.163(c)(1), we propose to strike the term "receipt" and replace it with "service". In paragraph 308.163 (c)(2), we suggest striking the opening phrase "Summarize or cite to" and insert "Set forth the basis and facts in support of the notice or order and address". Finally, we propose to add a new paragraph 308.163(d) adopting the OTS requirements for requesting a hearing under this section. The new paragraph provides guidance for the institution-affiliated party to identify the issues to be resolved and the requested relief.

Section 308.164 Hearings

In paragraph 308.164(b)(3), we propose adding the following sentence at the end of the paragraph, "Following the introduction of all evidence, the applicant and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right

to oral argument, and, in lieu thereof, elect to submit written argument." In paragraph 308.164(b)(5), we propose adding the following sentence at the end of the paragraph, "A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record sua sponte or upon the motion of any party." Finally, we propose to add a new paragraph 308.164(b)(10) clarifying that the institution-affiliated party has the burden of proof to show that his or her continued participation in the industry does not pose a threat to, or public confidence in, insured institutions.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking, and specifically requests comments on the following:

Do the amended provisions of 12 CFR part 308, subparts A, B, C, K, and N consistently apply the same regulation to both State savings associations and State nonmember banks?

What negative impacts, if any, can you foresee in the FDIC's proposed revisions of 12 CFR part 308, subparts A, B, C, K, and N?

Written comments must be received by the FDIC no later than June 20, 2014.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

The Proposed Rule would rescind and remove from FDIC regulations part 390, subparts B, C, D, and E, and makes minor amendments to part 308, subparts A, B, C, K, and N to expressly make those provisions applicable to State savings associations and to modify FDIC regulations in minor ways that will improve enforcement practices and procedures. These regulations will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.* requires that each federal agency either (1) certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities, or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment. This rule has a limited scope: It removes redundant regulations that affect State savings associations, and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Notwithstanding this certification, the FDIC invites comments on the impact of this rule on small entities.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, codified at 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.[3] The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. The **Federal Register** document would request that EGRPRA related comments be specific and provide alternatives whenever appropriate.

[3] Public Law 104–208 (Sept. 30, 1996).

List of Subjects

12 CFR Part 390

Administrative practice and procedure, Banks, Banking, Claims, Investigations lawyers, Penalties, Standards of conduct, State nonmember banks, and State savings associations.

12 CFR Part 308

Administrative practice and procedure, Banks, Banking, Claims, Investigations lawyers, Penalties, Standards of conduct, State nonmember banks, and State savings associations.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend parts 308 and 390 of Title 12 of the Code of Federal Regulations as set forth below:

PART 308—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), and 5414(b)(3); 15 U.S.C. 78 (h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s 78u, 78u–2, 78u–3 and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–358, Pub. L. 109–351, and Pub. L. 111–203, 124 Stat. 1376.

Subpart A—Uniform Rules of Practice and Procedure

■ 2. In § 308.1, revise paragraphs (e) introductory text, (e)(1), and (e)(9), and add paragraphs (e)(12) through (14) to read as follows:

§ 308.1 Scope.

* * * * *

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act ("FRA"), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

* * *

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC or the former Office of Thrift Supervision (OTS), the

terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

* * *

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d)(1), (5)–(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(14) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)–(4) and (r).

* * * * *

■ 3. In § 308.3, revise paragraphs (e), (j)(3), and (l) through (r), and add paragraph (s) to read as follows:

§ 308.3 Definitions.

* * * * *

(e) *Designee* of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors.

* * * * *

(j) * * *

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

* * * * *

(l) *Investigation* means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).

(m) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

(n) *Office of Financial Institution Adjudication* ("OFIA") means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve Board ("FRB"), the FDIC, and the National Credit Union Administration ("NCUA").

(o) *Party* means the FDIC and any person named as a party in any notice.

(p) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (j) of this section.

(q) *Respondent* means any party other than the FDIC.

(r) *Uniform Rules* means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.1 and as specified in subparts B through P of this part.

(s) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

■ 4. In § 308.25, revise paragraph (b) to read as follows:

§ 308.25 Request for document discovery from parties.

* * * * *

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per page copying rate imposed by 12 CFR part 309 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

* * * * *

Subpart B—General Rules of Procedure

■ 5. In § 308.101, revise paragraph (a) and add paragraph (d) to read as follows:

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1 of the Uniform Rules.

* * * * *

(d) Subparts A, B, and C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).

■ 6. In § 308.107, revise paragraph (a) to read as follows:

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.1 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

* * * * *

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

■ 7. In § 308.109, revise paragraphs (b)(1) and (2) to read as follows:

§ 308.109 Suspension and disbarment.

* * * * *

(b) * * *

(1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any state, territory, district, commonwealth, or possession; or any person who has been and remains suspended or barred from practice before the OCC, Board of Governors, the OTS, the NCUA, the Securities and Exchange Commission, or the Commodity Futures Trading Commission; or any person who has been, within the last ten years, convicted of a felony, or of a misdemeanor involving moral turpitude, shall be suspended automatically from appearing or practicing before the FDIC. A disbarment, suspension, or conviction within the meaning of this paragraph (b) shall be deemed to have occurred when the disbarring, suspending, or convicting agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment or an order on a plea of nolo contendere or on consent, regardless of whether a violation is admitted in the consent.

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Executive Secretary a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made. Failure to file any

such paper shall not impair the operation of any other provision of this section.

* * * * *

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA and Section 5(d)(1)(B) of HOLA

■ 8. Section 308.144 is revised to read as follows:

§ 308.144 Scope.

The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)) or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)). The Uniform Rules and subpart B of the Local Rules shall not apply to investigations under this subpart.

■ 9. Section 308.145 is revised to read as follows:

§ 308.145 Conduct of investigation.

An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.

■ 10. Section 308.146 is revised to read as follows:

§ 308.146 Powers of person conducting investigation.

The person designated to conduct the investigation shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the main office of the bank, institution, or affiliate is located or in which the witness resides or conducts business. The person conducting the investigation may obtain the assistance of counsel or others from both within and outside the FDIC. The persons who issue the order of investigation may limit, quash, or modify any subpoena or subpoena duces tecum, upon application and for good cause shown. The person conducting an investigation may report to the Board of Directors any instance where any attorney has engaged in contemptuous dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigation. The Board of Directors, upon motion of the person conducting the investigation, or on its own motion, may make a finding of contempt and may then summarily suspend, without a hearing, any attorney representing a witness from further participation in the investigation.

■ 11. Section 308.147 is revised to read as follows:

§ 308.147 Investigations confidential.

Investigations shall be confidential. Information and documents obtained by the FDIC in the course of such investigations shall not be disclosed, except as provided in part 309 of this chapter and as otherwise required by law.

■ 12. In § 308.148, revise the introductory text and paragraph (c) to read as follows:

§ 308.148 Rights of witnesses.

In an investigation:

* * * * *

(c) All persons testifying shall be sequestered. Such persons and their counsel shall not be present during the testimony of any other person, unless permitted in the discretion of the person conducting the investigation. Neither attorney(s) for the institution that is the subject of the investigation, nor attorney(s) for any other interested persons, shall have any right to be present during the testimony of any witness not personally represented by such attorney;

* * * * *

■ 13. In § 308.150, revise paragraph (a) to read as follows:

§ 308.150 Transcripts.

(a) *General rule.* Transcripts of testimony, if any, shall be recorded by an official reporter, or by any other person or means designated by the person conducting the investigation. A witness may, solely for the use and benefit of the witness, obtain a copy of the transcript of his or her testimony at the conclusion of the investigation or, at the discretion of the person conducting the investigation, at an earlier time, provided that the witness submits a written request for the transcript and the transcript is available. The witness requesting a copy of his or her testimony shall bear the cost thereof.

* * * * *

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

■ 14. In § 308.161, revise the introductory text and paragraph (a) introductory text to read as follows:

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following:

(a) Proceedings to suspend an institution-affiliated party of an insured state nonmember bank, or an insured state savings association, or to prohibit such party from further participation in the conduct of the affairs of any depository institution, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

* * * * *

■ 15. In § 308.163, revise paragraph (a)(2) and (c)(1) and (2), and add paragraph (d) to read as follows:

§ 308.163 Notice of suspension or prohibition, and orders of removal or prohibition.

(a) * * *

* * * * *

(2) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, who shall immediately comply with the requirements thereof, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

* * * * *

(c) * * *

(1) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after

service of the written notice or order; and

(2) Set forth the basis and facts in support of the notice or order and address the relevant considerations specified in § 308.162 of this subpart.

(d) To obtain a hearing, the institution-affiliated party shall file with the Executive Secretary a written request for a hearing within 30 days after service of the notice of suspension or prohibition or the order of removal or prohibition, which shall:

(1) Admit or deny specifically each allegation in the notice or order, or state that the institution-affiliated party is without knowledge or information, which statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When an institution-affiliated party intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder; and

(2) Shall state whether the institution-affiliated party is requesting termination or modification of the notice or order, and shall state with particularity how he intends to show that his continued service to or participation in the conduct of the affairs of the depository institution would not, or is not likely to, pose a threat to the interests of its depositors or to impair public confidence in the depository institution.

■ 16. In § 308.164, revise paragraphs (b)(3) and (5), and add paragraph (b)(10) to read as follows:

§ 308.164 Hearings.

* * * * *

(b) * * *

(3) The institution-affiliated party may appear at the hearing and shall have the right to introduce relevant and material documents. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff. Following the introduction of all evidence, the applicant and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

* * * * *

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the institution-affiliated party afforded the hearing. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record sua sponte or upon the motion of any party.

* * * * *

(10) The institution-affiliated party has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of a depository institution does not, or is not likely to, pose a threat to the interests of the depository institution's depositors or threaten to impair public confidence in the depository institution.

* * * * *

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

■ 17. The authority citation for part 390 is revised to read as follows:

Authority: 12 U.S.C. 1819.

Subpart A also issued under 12 U.S.C. 1820.

Subpart B also issued under 12 U.S.C. 1818.

Subpart C also issued under 5 U.S.C. 504; 554–557; 12 U.S.C. 1464; 1467; 1468; 1817; 1818; 1820; 1829; 3349, 4717; 15 U.S.C. 78*l*; 78o–5; 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart D also issued under 12 U.S.C. 1817; 1818; 1820; 15 U.S.C. 78*l*.

Subpart E also issued under 12 U.S.C. 1813; 1831m; 15 U.S.C. 78.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 *et seq.*

Subpart G also issued under 12 U.S.C. 2810 *et seq.*, 2901 *et seq.;* 15 U.S.C. 1691; 42 U.S.C. 1981, 1982, 3601–3619.

Subpart H also issued under 12 U.S.C. 1464; 1831y.

Subpart I also issued under 12 U.S.C. 1831x.

Subpart J also issued under 12 U.S.C. 1831p–1.

Subpart L also issued under 12 U.S.C. 1831p–1.

Subpart M also issued under 12 U.S.C. 1818.

Subpart N also issued under 12 U.S.C. 1821.

Subpart O also issued under 12 U.S.C. 1828.

Subpart P also issued under 12 U.S.C. 1470; 1831e; 1831n; 1831p–1; 3339.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

Subpart R also issued under 12 U.S.C. 1463; 1464; 1831m; 1831n; 1831p–1.

Subpart S also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p–1; 1881–1884; 3207; 3339; 15 U.S.C. 78b; 78*l*; 78m; 78n; 78p; 78q; 78w; 31 U.S.C. 5318; 42 U.S.C. 4106.

Subpart T also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l*; 78m; 78n; 78w.

Subpart U also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l*; 78m; 78n; 78p; 78w; 78d–1; 7241; 7242; 7243; 7244; 7261; 7264; 7265.

Subpart V also issued under 12 U.S.C. 3201–3208.

Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l*; 78m; 78n; 78p; 78w.

Subpart X also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828; 3331 *et seq.*

Subpart Y also issued under 12 U.S.C. 1831o.

Subpart Z also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828 (note).

Subpart B—[Removed and reserved]

■ 18. Remove and reserve part 390, subpart B consisting of §§ 390.10 through 390.23.

Subpart C—[Removed and reserved]

■ 19. Remove and reserve part 390, subpart C consisting of §§ 390.30 through 390.75.

Subpart D—[Removed and reserved]

■ 20. Remove and reserve part 390, subpart D consisting of §§ 390.80 through 390.86.

Subpart E—[Removed and reserved]

■ 21. Remove and reserve part 390, subpart E consisting of §§ 390.90 through 390.97.

Dated at Washington, DC, this 8th day of April, 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2014–08260 Filed 4–18–14; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 335 and 390

RIN 3064–AE07

Securities of State Savings Associations and Securities of Nonmember Insured Banks

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") proposes to rescind and remove its

regulations concerning securities of State savings associations and amend its regulations relating to securities of nonmember insured banks, extending applicability to State savings associations.

DATES: Comments must be received on or before June 20, 2014.

ADDRESSES: You may submit comments, identified by RIN 3064–AE07, by any of the following methods:

- *Agency Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web site.
- *Email: Comments@fdic.gov.* Include the RIN 3064–AE07 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received must include the agency name and RIN 3064–AE07 for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226 by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: Dennis Chapman, Senior Staff Accountant, Division of Risk Management Supervision, 202–898–8922 or *dchapman@fdic.gov*; Maureen Loviglio, Senior Staff Accountant, Division of Risk Management Supervision, 202–898–6777 or *mloviglio@fdic.gov*; Mark G. Flanigan, Counsel, Legal Division 202–898–7426 or *mflanigan@fdic.gov*; or Grace Pyun, Senior Attorney, Legal Division 202–898–3609 or *gpyun@fdic.gov.*

SUPPLEMENTARY INFORMATION: The Federal Deposit Insurance Corporation ("FDIC") proposes to rescind and remove from the Code of Federal Regulations 12 CFR part 390 subpart U, entitled *Securities of State Savings Associations* ("part 390 subpart U") and all references thereto, and revise 12 CFR part 335 ("part 335"), currently entitled *Securities of Nonmember Insured Banks,* to extend its applicability to State savings associations. Part 390 subpart U was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision ("OTS") on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Upon removal of part 390 subpart U and all related references from the FDIC rules and regulations and amendment of part 335, all State nonmember banks and State savings associations having securities registered pursuant to the Securities Exchange Act of 1934 ("Exchange Act") and for which the FDIC has been designated the appropriate federal banking agency will be subject to the disclosure and filing requirements found at part 335. The proposed rule would retitle part 335 as *Securities of State Nonmember Banks and State Savings Associations* and revise part 335 by inserting the term "State savings association" where appropriate so that the FDIC rules governing the disclosure and filing requirements of securities registered pursuant to the Exchange Act will apply to both State nonmember banks and State savings associations. Finally, the proposed rule makes minor technical and conforming amendments to part 335 by removing section 335.901 and deleting all references to the "Division of Supervision and Consumer Protection (DSC)" and adding the words "Division of Risk Management Supervision (RMS)" to reflect an internal FDIC reorganization.

I. Background

The Dodd-Frank Act

The Dodd-Frank Act, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies.[1] Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,[2] the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency ("OCC"), as to Federal savings associations, and the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act,[3] provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd Frank Act[4] further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.[5]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act[6] granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the FDI Act and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended section 3(q) of the Federal Deposit Insurance Act,[7] and designated the FDIC as the "appropriate Federal banking agency" for State savings associations. As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify, and rescind regulations involving such associations.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain regulations transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.[8] When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 12 U.S.C. 5301 *et seq.* (2010).

[2] 12 U.S.C. 5411.

[3] 12 U.S.C. 5414(b).

[4] 12 U.S.C. 5414(c).

[5] 76 FR 39247 (July 6, 2011).

[6] 12 U.S.C. 5412(b)(2)(B)(i)(II).

[7] 12 U.S.C. 1813(q).

[8] 76 FR 47652 (August 5, 2011).

transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the regulations transferred to the FDIC, 12 CFR part 390 subpart U, covers the former OTS requirements for the disclosure and reporting by State savings associations with securities registered pursuant to section 12(i) of the Exchange Act.[9]

The Securities Exchange Act of 1934 and the Securities of State Nonmember Banks and State Savings Associations

The Exchange Act governs the sales of securities offered by an issuer on the secondary market and establishes a mandatory periodic disclosure process that is designed to require registered companies to make public the information that investors would find pertinent in making investment decisions.[10] Section 12(i) of the Exchange Act grants authority to the Federal banking agencies to administer specific sections of the Exchange Act and the Sarbanes-Oxley Act of 2002 ("SOX Act") with regard to depository institutions for which each Federal bank agency is the appropriate Federal banking agency.[11]

Prior to the Dodd-Frank Act, section 12(i) of the Exchange Act provided the FDIC with the powers, functions, and duties vested in the Securities and Exchange Commission ("SEC") to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and sections 302–304, 306, 401(b), 404, 406, and 407 of the SOX Act with respect to State nonmember banks. Also pursuant to section 12(i), the OTS had the same vested authority with respect to Federal and State savings associations. As part of the transfer of OTS authority to the OCC for Federal savings associations and FDIC for State savings associations, section 376(2) of the Dodd-Frank Act amended section 12(i) of the Exchange Act to provide the FDIC with authority over both State nonmember banks and State savings associations to administer the enumerated provisions of the Exchange Act and the SOX Act as well as the authority to make such rules and regulations as may be necessary for the execution of the functions vested in the FDIC under section 12(i).[12]

As noted above, the regulations governing OTS implementation of the securities registration and reporting requirements of the Exchange Act, formerly found at 12 CFR part 563d, were transferred in their entirety to the FDIC as they relate to State savings associations, with only non-substantive changes and are now found in the FDIC's rules at part 390 subpart U. Part 390 subpart U incorporates the SEC rules regarding the filing and processing of forms[13]; the form and content of financial statements[14]; reporting requirements of issuers[15]; and the SEC's interpretations of the rules.

The FDIC's corresponding rules for State nonmember banks are found in part 335. While both part 390 subpart U and part 335 implement identical provisions of the Exchange Act and SEC rules, part 335 does so with greater specificity by incorporating the SEC rules regarding: the certification, suspension of, and removal from listing by exchanges[16]; unlisted trading[17]; forms for notification of action taken by national securities exchanges[18]; exemptions from and termination of registration of securities[19]; forms, reports, and acquisition statements of securities issuers and the maintenance of such reports[20]; solicitation of proxies and tender offers[21]; and beneficial ownership statements.[22]

After careful review and comparison of part 390 subpart U and part 335, the FDIC proposes to rescind part 390 subpart U and remove all such references from the Code of Federal Regulations. This subpart is substantively similar to part 335 as both State nonmember banks and State savings associations are subject to the same provisions of the Exchange Act and the SOX Act. Part 335, with minor revisions, will appropriately and sufficiently implement the requirements of section 12(i) of the Exchange Act for both State nonmember banks and State savings associations now under FDIC supervision. As discussed above, part 335 provides more detailed guidance than part 390 subpart U by incorporating the SEC rules with greater specificity. Furthermore, State savings associations would benefit from greater clarity and guidance under part 335 with regard to FDIC-specific procedures for the submission of securities filings and forms as well as other FDIC-specific administrative practices that are not provided for in part 390 subpart U.[23]

Additionally, at the time of the transfer of the former OTS regulations to the FDIC, there were no registered State savings associations affected by the transfer. Currently, there is only *one* registered State savings association that would be subject to part 335. Any FDIC-supervised banks and State savings associations that register under section 12(i) of the Exchange Act in the future would benefit from a consistent and streamlined application of the Federal securities disclosure and filing requirements that would be facilitated through the proposed changes.

Therefore, based on the above, the FDIC proposes to rescind and remove from the Code of Federal Regulations the rules located at part 390 subpart U and expand the scope of part 335 to include State savings associations. If the proposed rule is adopted as a final rule, all State nonmember banks and State savings associations supervised by the FDIC and subject to the registration and reporting requirements of the Exchange Act will be subject to the same FDIC rules, as modified herein.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(c), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 390 subpart U, which concern the securities filing and disclosure requirements of State savings

[9] 15 U.S.C. 78l(i).

[10] An issuer that is a bank or savings association is subject to the registration requirements of the Exchange Act if, in general, it has securities listed on a national exchange or, as of the last day of its last fiscal year, it has total assets exceeding $10 million and a class of equity securities held of record by 2,000 or more persons. *See* sections 12(b) and 12(g)(1)(B) of the Exchange Act. A bank or savings association issuer will become exempt from the Exchange Act reporting requirements if it is no longer listed on a national exchange or, if it is not listed, the number of record holders falls below 1,200 persons. *See* sections 12(d) and 12(g)(4) of the Exchange Act.

[11] 15 U.S.C. 78l(i). The specifically enumerated sections relate to sections 10A(m) (audit committee listing standards), 12 (securities registration), 13 (periodic reporting), 14(a) (proxies and proxy solicitation), 14(c) (information statements), 14(d) (tender offers), 14(f) (election of directors contests), and 16 (beneficial ownership and reporting) of the Exchange Act, and sections 302–304 and 306 (corporate responsibilities) and 401(b), 404, 406, and 407 (enhanced financial disclosures) of the SOX Act.

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, section 376(2), 124 Stat. 1376, 1569 (2010).

[13] 17 CFR part 249.

[14] 17 CFR part 210.

[15] 17 CFR part 229.

[16] 17 CFR part 240.

[17] *Id.*

[18] 17 CFR part 249.

[19] 17 CFR part 240.

[20] *Id.*

[21] *Id.*

[22] *Id.* The FDIC incorporates section 16 of the Exchange Act and SEC rule 17 CFR part 240 on beneficial ownership of securities, but requires the filing of FDIC specific forms in lieu of the SEC's forms. 12 CFR 337.601, 611–613.

[23] 12 CFR 335.701–901 (Addressing confidentiality requests, filing procedures, and delegations of authority).

associations, the FDIC, as the appropriate federal banking agency for State savings associations, proposes to remove part 390 subpart U in its entirety and remove all references to Subpart U found in the FDIC rules and regulations in order to avoid confusion and inconsistency. Two references to subpart U are made in Sections 390.321(b)(2) and 390.380(a)(3) of the FDIC rules and regulations. After review, the FDIC finds that these sections would not substantively be affected by the removal of subpart U from the Code of Federal Regulations and therefore also proposes to remove such references from each section.[24]

The FDIC also proposes to revise the heading of part 335 by retitling it as *Securities of State Nonmember Banks and State Savings Associations* and revise part 335 by inserting the term "State savings association" where appropriate. The rewording of "Nonmember Insured Banks" to "State Nonmember Banks" reflects more consistent use of defined terms under section 3 of the FDI Act.[25] Additionally, minor technical amendments to part 335 will be made by removing section 335.901, which contains the FDIC Board of Directors' Delegations of Authority related to Part 335, and deleting all references to the "Division of Supervision and Consumer Protection (DSC)" and adding the words "Division of Risk Management Supervision (RMS)" to reflect an internal FDIC reorganization. If the proposal is finalized, 12 CFR part 335 would apply to the securities of both State nonmember banks and State savings associations registered under the Exchange Act, and part 390 subpart U would be removed.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking. In particular, the FDIC requests comments on the following questions:

1. Are the provisions of 12 CFR part 335 sufficient to provide consistent and effective filing and disclosure requirements for securities registered under the Exchange Act, regardless of whether they are securities of insured State nonmember banks or insured State savings associations? Please provide a detailed response.

2. Should part 390 subpart U pertaining to the securities of State savings associations be retained in whole or in part? Please substantiate your response.

3. What negative impacts, if any, can you foresee in the FDIC's proposal to rescind part 390 subpart U and remove it from the Code of Federal Regulations?

4. What negative impacts, if any, can you foresee in the FDIC's proposal to apply part 335 to State savings associations?

Written comments must be received by the FDIC no later than June 20, 2014.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act ("PRA") of 1995 (44 U.S.C. 3501–3521), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The information collection affected by this NPR is Securities of Insured Nonmember Banks, 3064–0030.[26] The FDIC proposes to remove from its regulations 12 CFR part 390 subpart U. Part 390 subpart U was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by Title III of the Dodd-Frank Act. Part 390 subpart U has been determined to be substantively similar to the FDIC's rule at part 335 regarding the securities of insured State nonmember banks. Removing part 390 subpart U will not involve any new collections of information pursuant to the PRA.

This rule also proposes to amend part 335 to incorporate State savings associations into the part. The revision of part 335 to include "State savings associations" would add additional burden to the FDIC's current information collection under OMB control number 3064–0030, Securities of Insured Nonmember Banks, as State savings associations would be required to submit the appropriate forms and financial statements to comply with the filing and disclosure requirements of part 335. Currently, there is only one State savings association that is registered pursuant to the Exchange Act requirements that would be affected by the proposed revision to part 335. The FDIC proposes to revise this information collection as follows:

Title: Securities of State Nonmember Banks and State Savings Associations.

OMB Number: 3064–0030.

Form Numbers: 6800/03, 6800/04, 6800/05, Form 8–A, Form 8–C, Form 8–K, Form 10, Form 10–C, Form 10–K, Form 10–Q, Form 12b–25, Form 15, Form 25, Schedule 13D, Schedule 13E–3, Schedule 13G, Schedule 14A, Schedule 14C, Schedule 14D–1 (Schedule TO).

Affected Public: Generally, any issuer of securities, reporting company, or shareholder registered under the Securities Exchange Act of 1934 with respect to securities registered under 12 CFR part 335.

Estimated Number of Respondents: Form 6800/03—58; Form 6800/04—297; Form 6800/05—69; Form 8–A—2; Form 8–C—2; Form 8–K—21; Form 10—2; Form 10–C—1; Form 10–K—21; Form 10–Q—21, Form 12b–25—6; Form 15—2; Form 25—2; Schedule 13D—2; Schedule 13E–3—2; Schedule 13G—2; Schedule 14A—21; Schedule 14C—21; Schedule 14D–1 (Schedule TO)—2.

Estimated Time per Response: Form 6800/03—1 hour; Form 6800/04—30 minutes; Form 6800/05—1 hour; Form 8–A—3 hours; Form 8–C—2 hours; Form 8–K—2 hours; Form 10—215 hours; Form 10–C—1 hour; Form 10–K—140 hours; Form 10–Q—100 hours; Form 12b–25—3 hours; Form 15—1 hours; Form 25—1 hours; Schedule 13D—3 hours; Schedule 13E–3—3 hours; Schedule 13G—3 hours; Schedule 14A—40 hours; Schedule 14C—40 hours; Schedule 14D–1 (Schedule TO)—5 hours.

Frequency of Response: Forms 6800/05 and 10–K and Schedule 14A are filed annually. Form 10–Q is filed quarterly. All other forms are filed based on each event or transaction.

Existing annual burden: 717 hours.

New estimated additional annual burden: 10,829 hours.

Total Estimated Annual Burden: 11,546 hours.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

[24] Both sections are also part of the transferred OTS regulations pursuant to the Dodd Frank Act Section 390.321 (part 390 subpart R) relates to regulatory reporting standards and section 390.380 (part 390 subpart T) relates to the form and content of financial statements.

[25] 12 U.S.C. 1813(o).

[26] The information collection for Securities of Insured Nonmember Banks, OMB No. 3064–0030, was renewed by OMB on September 11, 2013, and now expires on September 30, 2016.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $500 million).[27] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the **Federal Register** together with the rule.

As discussed in this notice of proposed rulemaking, part 390 subpart U was transferred from the OTS's part 563d, which governs the public disclosure and filing requirements of State savings associations that issue securities registered pursuant to the Exchange Act. The corresponding FDIC rule for State nonmember banks is 12 CFR part 335. After careful review of both rules, the FDIC proposes to remove part 390 subpart U in its entirety and revise part 335 to incorporate State savings associations into the scope of the part.

For the purposes of the RFA analysis, savings associations with total assets of $500 million or less are considered "small entities." Additionally, the Exchange Act exempts an issuer of securities from the registration and reporting requirements of the Act if it does not meet the statutory registration threshold under section 12(g) of the Exchange Act unless the issuer lists its securities on a national exchange and is subject to registration under section 12(b) of the Exchange Act. Under section 12(g), a savings association that issues securities is subject to the Exchange Act requirements if, as of the last day of its last fiscal year, it has total assets of more than $10 million and a class of equity securities (other than an exempted security) held of record by either 2,000 persons or 500 persons who are not accredited investors.[28]

Consequently, insured State savings associations that have total assets of $500 million or less and meet the registration threshold under section 12(g) would be affected by this proposed rule. Based on both of the section 12(g) criteria, as of the current date, there is one insured State savings associations that would be affected by the proposed rule out of a total universe of 58 insured State savings associations. The proposed rule also would apply to insured State savings associations with securities listed on a national exchange; however, as of the current date, no insured State savings association has listed securities. Therefore, a substantial number of small entities would not be affected.

Additionally, as discussed in the proposed rule, part 390 subpart U and part 335 are substantively similar as both State nonmember banks and State savings associations are subject to the same provisions of the Exchange Act and the SOX Act. Both parts incorporate by reference the same SEC rules such that registered State nonmember banks and State savings associations currently must comply with substantially similar forms and reporting obligations. Therefore, there would be no additional compliance burden imposed on registered State savings associations that would result in a significant economic impact on small State savings associations.

For these reasons, the FDIC certifies that the Proposed Rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Accordingly, a regulatory flexibility analysis is not required.

C. Plain Language

Section 722 of the Gramm Leach Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule to rescind part 390 subpart U and revise part 335 in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.[29] The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects

12 CFR Part 335

Banks, banking, Savings Associations, Securities.

12 CFR Part 390

Savings Associations, Securities.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend parts 335 and 390 of title 12 of the Code of Federal Regulations as follows:

PART 335—SECURITIES OF STATE NONMEMBER BANKS AND STATE SAVINGS ASSOCIATIONS

■ 1. The authority citation for part 335 is revised as follows:

Authority: 12 U.S.C. 1819; 15 U.S.C. 78l(i), 78m, 78n, 78p, 78w, 5412, 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

■ 2. Revise the heading of part 335 to read as set forth above:

■ 3. In § 335.101, revise paragraph (a) to read as follows:

§ 335.101 Scope of part, authority, and OMB control number.

(a) This part is issued by the Federal Deposit Insurance Corporation (the FDIC) under section 12(i) of the Securities Exchange Act of 1934, 15 U.S.C. 78 *et seq.* (the Exchange Act), and applies to all securities of FDIC-insured State nonmember banks (including foreign banks having an insured branch) and State savings associations that are subject to the registration requirements of section 12(b) or section 12(g) of the Exchange Act. The FDIC is vested with the powers, functions, and duties of the Securities and Exchange Commission (SEC) to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f),

[27] 5 U.S.C. 601 *et seq.*

[28] 15 U.S.C. 78*l*(g)(1)(A). Based on the statutory language of the Exchange Act, savings associations would not fall under the higher registration exemption thresholds provided to banks and bank holding companies pursuant to the Jumpstart Our Business Startups Act ("JOBS Act"), which was enacted April 5, 2012.

[29] Public Law 104–208 (Sept. 30, 1996).

and 16 of the Exchange Act (15 U.S.C. 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78(p)), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding State nonmember banks and State savings associations with one or more classes of securities subject to the registration provisions of sections 12(b) and 12(g) of the Exchange Act.

* * * * *

■ 4. In § 335.221, revise paragraph (b) to read as follows:

§ 335.221 Forms for registration of securities and cross reference to Regulation FD (Fair Disclosure).

* * * * *

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks and State savings associations may also refer to the instructions for Federal Financial Institutions Examination Council (FFIEC) Consolidated Reports of Condition and Income when preparing unaudited interim statements. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are provided at Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

* * * * *

■ 5. In § 335.311, revise paragraph (b) to read as follows:

§ 335.311 Forms for annual, quarterly, current, and other reports of issuers.

* * * * *

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks and State savings associations may also refer to the instructions for FFIEC Consolidated Reports of Condition and Income when preparing unaudited interim reports. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are included in Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

■ 6. In § 335.701, revise paragraphs (a) and (b) to read as follows:

§ 335.701 Filing requirements, public reference, and confidentiality.

(a) *Filing requirements.* Unless otherwise indicated in this part, one original and four conformed copies of all papers required to be filed with the FDIC under the Exchange Act or regulations thereunder shall be filed at its office in Washington, DC. Official filings may be filed electronically at *https://www2.fdicconnect.gov/index.asp,* except for FDIC Beneficial Ownership Forms 3, 4, and 5 for which electronic filing is mandatory as described in Sec. 335.801(b). Paper filings should be submitted to the FDIC's office in Washington, DC, and should be addressed as follows: Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Material may be filed by delivery to the FDIC through the mails or otherwise. The date on which paper filings are actually received by the designated FDIC office shall be the date of filing.

(b) *Inspection.* Except as provided in paragraph (c) of this section, all information filed regarding a security registered with the FDIC will be available for inspection at the Federal Deposit Insurance Corporation, Accounting and Securities Disclosure Section, Division of Risk Management Supervision, 550 17th Street, NW., Washington, DC. Beneficial ownership report forms and other official filings that are electronically submitted to the FDIC are available for inspection on the FDIC's Web site at *http://www2.fdic.gov/efr/*

* * * * *

■ 7. In § 335.801, revise paragraphs (b)(6)(i) introductory text, (b)(7)(iii), (d) introductory text and (d)(1), (e)(1), (e)(2)(i), (e)(2)(ii), and (f)(2) to read as follows:

§ 335.801 Inapplicable SEC regulations; FDIC substituted regulations; additional information.

* * * * *

(b) * * *

(6) * * *

(i) A filer may apply in writing for a continuing hardship exemption if all or part of a filing or group of filings otherwise to be filed in electronic format cannot be so filed without undue burden or expense. Such written application shall be made at least ten business days prior to the required due date of the filing(s) or the proposed filing date, as appropriate, or within such shorter period as may be permitted. The written application shall be sent to the Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429, and shall contain the information set forth in paragraph (b)(6)(ii) of this subsection.

* * * * *

(7) * * *

(iii) Where the FDIC's rules require a filer to furnish a national securities exchange, a national securities association, a bank, or State savings association, paper copies of a document filed with the FDIC in electronic format, signatures to such paper copies may be in typed form.

* * * * *

(d) *Indebtedness of management.* Whenever this part of cross referenced provisions of the SEC regulations require disclosure of indebtedness of management, extensions of credit to specified persons in excess of ten (10) percent of the equity capital accounts of the bank or State savings associations or $5 million, whichever is less, shall be deemed material and shall be disclosed in addition to any other required disclosure. The disclosure of this material indebtedness shall include the largest aggregate amount of indebtedness (in dollar amounts, and as a percentage of total equity capital accounts at the time), including extensions of credit or overdrafts, endorsements and guarantees outstanding at any time since the beginning of the bank or State savings association's last fiscal year, and as of the latest practicable date.

(1) If aggregate extensions of credit to all specified persons as a group exceeded 20 percent of the equity capital accounts of the bank or State savings association at any time since the beginning of the last fiscal year, the aggregate amount of such extensions of credit shall also be disclosed.

* * * * *

(e) * * *

(1) Three preliminary copies of each information statement, proxy statement, form of proxy, and other item of soliciting material to be furnished to security holders concurrently therewith, shall be filed with the FDIC by the bank, State savings association, or any other person making a solicitation subject to 12 CFR 335.401 at least ten calendar days (or 15 calendar days in the case of other than routine meetings, as defined in paragraph (e)(2) of this section) prior to the date such item is first sent or given to any security holders, or such shorter date as may be authorized.

(2) * * *

(i) A meeting with respect to which no one is soliciting proxies subject to 12 CFR 335.401 other than on behalf of the bank or State savings association and at which the bank or State savings

association intends to present no matters other than:

(A) The election of directors;

(B) The election, approval or ratification of accountants;

(C) A Security holder proposal included pursuant to SEC Rule 14(a)–8 (17 CFR 240.14a–8); and

(D) The approval or ratification of a plan as defined in paragraph (a)(7)(ii) of Item 402 of SEC Regulation S–K (17 CFR 229.402(a)(7)(ii)) or amendments to such a plan; and

(ii) The bank or State savings association does not comment upon or refer to a solicitation in opposition (as defined in 17 CFR 240.14a–6) in connection with the meeting in its proxy material.

* * * * *

(f) * * *

(2) The FDIC may, upon the written request of the bank or State savings association, and where consistent with the protection of investors, permit the omission of one or more of the statements or disclosures herein required, or the filing in substitution therefor of appropriate statements or disclosures of comparable character.

* * * * *

§ 335.901 [Removed]

■ 8. Remove § 335.901.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

■ 9. The authority citation for part 390 is revised to read as follows:

Authority: 12 U.S.C. 1819.

Subpart A also issued under 12 U.S.C. 1820.

Subpart B also issued under 12 U.S.C. 1818.

Subpart C also issued under 5 U.S.C. 504; 554–557; 12 U.S.C. 1464; 1467; 1468; 1817; 1818; 1820; 1829; 3349, 4717; 15 U.S.C. 78*l*; 78o–5; 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart D also issued under 12 U.S.C. 1817; 1818; 1820; 15 U.S.C. 78*l*.

Subpart E also issued under 12 U.S.C. 1813; 1831m; 15 U.S.C. 78.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 *et seq.*

Subpart G also issued under 12 U.S.C. 2810 *et seq.*, 2901 *et seq.*; 15 U.S.C. 1691; 42 U.S.C. 1981, 1982, 3601–3619.

Subpart I also issued under 12 U.S.C. 1831x.

Subpart J also issued under 12 U.S.C. 1831p–1.

Subpart K also issued under 12 U.S.C. 1817; 1818; 15 U.S.C. 78c; 78*l*.

Subpart L also issued under 12 U.S.C. 1831p–1.

Subpart M also issued under 12 U.S.C. 1818.

Subpart N also issued under 12 U.S.C. 1821.

Subpart O also issued under 12 U.S.C. 1828.

Subpart P also issued under 12 U.S.C. 1470; 1831e; 1831n; 1831p–1; 3339.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

Subpart R also issued under 12 U.S.C. 1463; 1464; 1831m; 1831n; 1831p–1.

Subpart S also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p–1; 1881–1884; 3207; 3339; 15 U.S.C. 78b; 78*l*; 78m; 78n; 78p; 78q; 78w; 31 U.S.C. 5318; 42 U.S.C. 4106.

Subpart T also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l*; 78m; 78n; 78w.

Subpart V also issued under 12 U.S.C. 3201–3208.

Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l*; 78m; 78n; 78p; 78w.

Subpart X also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828; 3331 *et seq.*

Subpart Y also issued under 12 U.S.C. 1831o.

Subpart Z also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828 (note).

PART 390 Subpart U—[Removed and Reserved]

■ 10. Remove and reserve part 390 subpart U, consisting of §§ 390.390 through 390.395.

■ 11. In § 390.321, revise paragraph (b)(2) to read as follows:

§ 390.321 Regulatory reports.

* * * * *

(b) * * *

(2) *Exceptions.* Regulatory reporting requirements that are not consistent with GAAP, if any, are not required to be reflected in the audited financial statements, including financial statements contained in securities filings submitted to the FDIC pursuant to the Securities Exchange Act of 1934 or subpart W and 12 CFR part 192.

* * * * *

§ 390.380 [Amended]

■ 12. In § 390.380, remove paragraph (a)(3).

Dated at Washington, DC, this 8th day of April 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2014–08261 Filed 4–18–14; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0250; Directorate Identifier 2013–NM–165–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B16 (CL–604 Variant) airplanes. This proposed AD was prompted by reports of in-flight uncommanded rudder movements. This proposed AD would require revising the airplane flight manual (AFM) to incorporate an uncommanded yaw motion procedure. We are proposing this AD to prevent in-flight uncommanded rudder movements, which could lead to structural failure and subsequent loss of the airplane.

DATES: We must receive comments on this proposed AD by June 5, 2014.

ADDRESSES: You may send comments by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: (202) 493–2251.
- Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- Hand Delivery: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://*

www.regulations.gov by searching for and locating Docket No. FAA–2014–0250; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Lake Walker, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7363; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2014–0250; Directorate Identifier 2013–NM–165–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2013–22, dated August 12, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–2B16 (CL–604 Variant) airplanes. The MCAI states:

> There have been several reported incidents where Bombardier Regional Jet aeroplanes experienced in-flight uncommanded rudder movements. Investigation revealed that a failure of the voltage regulator inside the yaw damper actuator could lead to uncommanded yaw movement. If not corrected, this condition could lead to structural failure and the subsequent loss of the aeroplane.
>
> Since the Challenger 604 aeroplanes have the same system, and can also experience a similar problem of uncommanded yaw movement, Transport Canada is issuing this [Canadian] AD that mandates the introduction of an emergency procedure to the Aeroplane Flight Manual (AFM) to address the above mentioned unsafe condition.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014 0250.

Relevant Service Information

Bombardier, Inc. has issued emergency procedures for the applicable AFMs:

- For Model CL–600–2B16 (CL–604 Variant) airplanes having serial numbers (S/Ns) 5301 through 5665 inclusive: Procedure 1.C., Uncommanded Yaw Motion, of Section 03–06, Automatic Flight Control System, of Chapter 3—Emergency Procedures, of the Bombardier Challenger CL–604 AFM, PSP 604–1, Revision 89, dated July 8, 2013; and
- For Model CL–600–2B16 (CL–604 Variant) airplanes having S/Ns 5701 and subsequent: Procedure 1.C., Uncommanded Yaw Motion, of Section 03–06, Automatic Flight Control System, of Chapter 3—Emergency Procedures, of the Bombardier Challenger CL–605 AFM, PSP 605–1, Revision 25, dated July 8, 2013.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 116 airplanes of U.S. registry.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $9,860, or $85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Bombardier, Inc.: Docket No. FAA–2014–0250; Directorate Identifier 2013–NM–165–AD.

(a) Comments Due Date

We must receive comments by June 5, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B16 (CL–604 Variants) airplanes, certificated in any category, serial numbers (S/Ns) 5301 through 5665 inclusive, and 5701 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 22, Autopilot System; and Code 27, Rudder Actuator.

(e) Reason

This AD was prompted by reports of in-flight uncommanded rudder movements. We are issuing this AD to prevent in-flight uncommanded rudder movements, which could lead to structural failure and subsequent loss of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Airplane Flight Manual (AFM) Revision

Within 30 days after the effective date of this AD, revise the Emergency Procedures Section of the applicable Bombardier AFM to incorporate the uncommanded yaw motion procedure specified in paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For Model CL–600–2B16 (CL–604 Variant) airplanes having S/Ns 5301 through 5665 inclusive: Procedure I.C., Uncommanded Yaw Motion, of Section 03–06, Automatic Flight Control System, of Chapter 3—Emergency Procedures, of the Bombardier Challenger CL–604 AFM, PSP 604–1, Revision 89, dated July 8, 2013.

(2) For Model CL–600–2B16 (CL–604 Variant) airplanes having S/Ns 5701 and subsequent: Procedure I.C., Uncommanded Yaw Motion, of Section 03–06, Automatic Flight Control System, of Chapter 3—Emergency Procedures, of the Bombardier Challenger CL–605 AFM, PSP 605–1, Revision 25, dated July 8, 2013.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, FAA, New York Aircraft Certification Office (ACO), ANE–170, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the New York ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they were approved by the State of Design Authority (or its delegated agent, or the Design Approval Holder with a State of Design Authority's design organization approval, as applicable). You are required to ensure the product is airworthy before it is returned to service.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2013–22, dated August 12, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0250.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on April 14, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–08986 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 1

[Docket No. USCG–2008–1259]

RIN 1625–AB32

Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard

AGENCY: Coast Guard, DHS.

ACTION: Proposed rule; notice of public meetings; request for comments.

SUMMARY: The Coast Guard announces two public meetings to receive comments on a notice of proposed rulemaking addressing the Coast Guard's assessment framework for, and restating its position regarding, the federalism implications of regulations issued under the authority of various statutes within Titles 33 and 46 of the United States Code. The meetings will be held in two locations in order to allow for greater public involvement.

DATES: The public meetings will be held on the following dates:

- Arlington, VA [Washington, DC-area], May 13, 2014, from 12:30 p.m. to 3 p.m.
- Seattle, WA, May 16, 2014, from 12:30 p.m. to 3 p.m.

The meetings may conclude before the allotted time if all matters for discussion have been addressed. Written comments and related material may also be submitted to Coast Guard personnel specified at that meeting.

Those who plan to attend should notify the Coast Guard of their plans by May 6, 2014, using the contact information in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

The comment period for the proposed rule closes May 26, 2014. All comments and related material submitted after the meeting must either be submitted to our online docket via *http://www.regulations.gov* on or before May 26, 2014, or reach the Docket Management Facility by that date.

ADDRESSES: The public meetings will be held at the following locations:

- Arlington, VA [Washington, DC-area]—U.S. Coast Guard Personnel Service Center (PSC), 4200 Wilson Boulevard, Alexander Hamilton Room, 9th floor, Arlington, VA 20598–7200
- Seattle, WA—Henry M. Jackson Federal Building, 915 Second Avenue, North Auditorium, Room 3448, Seattle, WA 98174–1067

You may submit written comments identified by docket number USCG–2005–21869 before or after the meeting using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. Our online docket for this rulemaking is available on the Internet at *http://www.regulations.gov* under docket number USCG–2008–1259.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the meetings or the proposed rule, please call or email Lieutenant Commander Lineka Quijano, Office of Maritime and International Law, Coast Guard, telephone 202–372–3865, email *Lineka.N.Quijano@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

We published a notice of proposed rulemaking (NPRM) in the **Federal Register** on December 27, 2013 (78 FR 79242), entitled "Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard." In it we stated that we did not plan to hold a public meeting, but that we welcomed requests explaining why one would be beneficial. We received several requests and have concluded that public meetings would aid this rulemaking. Therefore, we are publishing this notice announcing two public meetings. We also have extended the comment period until May 26, 2014 (79 FR 17482).

In the NPRM, we proposed a rule containing our assessment framework for, and restating our position regarding, the federalism implications of regulations issued under the authority of various statutes within Titles 33 and 46 of the United States Code. We proposed adding a subpart 1.06 to Title 33 of the Code of Federal regulations to discuss existing law on preemption, identify the laws and regulations that have preemptive effect, and clarify (but not alter) the Coast Guard's application of statutes and case law regarding the preemptive effect of its regulations. The proposed rule does not offer new interpretations of the preemptive impact of Coast Guard regulations, and does not propose new regulations that would impact the states' ability to regulate and protect their waterways. Instead, our proposed rule simply restates the current preemptive impact of our regulations as they exist today. In other words, it provides a list of existing regulations that were previously determined to have preemptive impact under U.S. Supreme Court case law pronouncements on statutes implemented by the Coast Guard. Further, the proposed rule would not give preemptive impact to any specific future Coast Guard regulations. It merely provides the legal framework by which future regulations will be analyzed for preemptive impact.

You may view the NPRM, and public comments submitted thus far, in our online docket by going to *http://www.regulations.gov.* Once there, search for the docket number USCG–2008–1259, and then click "Open Docket Folder." If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

We encourage you to participate in this rulemaking by submitting comments either orally at the meeting or in writing. If you bring written comments to the meeting, you may submit them to Coast Guard personnel specified at the meeting to receive written comments. These comments will be posted to our online public docket. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact Lieutenant Commander Lineka Quijano at the telephone number or email address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Public Meeting

The Coast Guard will hold two public meetings regarding this proposed rule at the following locations on the following dates:

- Arlington, VA [Washington, DC-area], May 13, 2014, from 12:30 p.m. to 3 p.m., at the U.S. Coast Guard Personnel Service Center (PSC), 4200 Wilson Boulevard, Alexander Hamilton Room, 9th floor, Arlington, VA 20598–7200. **Note:** A valid government-issued photo identification (for example, a driver's license) will be required for entrance to the building or meeting space.
- Seattle, WA, May 16, 2014, from 12:30 p.m. to 3 p.m., at the Henry M. Jackson Federal Building, 915 Second Avenue, North Auditorium, Room 3448, Seattle, WA 98174–1067. **Note**: A valid government-issued photo identification (for example, a driver's license) will be required for entrance to the building.

To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LCDR Lineka Quijano, 7 days prior to the first meeting by using the contact information in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Requests made after May 6, 2014, might not be able to be accommodated. Please note that due to security considerations, a valid, government-issued photo identification must be presented to gain entrance to the building or meeting space.

Members of the public may attend these meetings up to the seating capacity of the rooms. The meetings may conclude before the allotted time if all matters of concern have been addressed.

We plan to record each meeting using an audio-digital recorder, and to make that audio recording available through a link in our online docket.

Dated: April 10, 2014.

Steven D. Poulin,

Rear Admiral, U.S. Coast Guard, Judge Advocate General.

[FR Doc. 2014–08934 Filed 4–18–14; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[EPA–R06–OW–2014–0234; FRL–9909–67–Region–6]

Ocean Dumping: Proposed Cancellation and Modification of Final Site Designations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to cancel the final designation of two Ocean Dredged Material Disposal Sites (ODMDSs) located in the Gulf of Mexico near the Houma Navigational Canal (HNC) and near the Mississippi River Gulf Outlet (MRGO) Canal, Louisiana. Both sites are EPA-approved ocean dumping sites for the disposal of suitable dredged material. This proposed action is being taken because there is no clear future need for the sites. Additionally, EPA proposes to modify the period of use, use restriction, and name of the Homeport Project ODMDS located in the Gulf of Mexico offshore of Port Aransas, Texas.

DATES: Comments on this proposed rule must be received on or before June 5, 2014.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OW–2014–0234, by one of the following methods: Federal e-Rulemaking Portal: *http://www.regulations.gov;* follow the online instruction for submitting comments.

- Email: Dr. Jessica Franks at *franks.jessica@epa.gov.*
- Fax: Dr. Jessica Franks, Marine and Coastal Section (6WQ–EC) at fax number 214–665–6689.
- Mail: Dr. Jessica Franks, Marine and Coastal Section (6WQ–EC), Environmental Protection Agency, Mailcode: (6WQ–EC), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

Instructions: Direct your comments to Docket No. EPA–R06–OW–2014–0234. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Marine and Coastal Section (6WQ–EC), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Jessica Franks, Ph.D., Marine and Coastal Section (6WQ–EC), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–8335, fax number (214) 665–6689; email address *franks.jessica@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Potentially Affected Persons
II. Background
III. Proposed Action
IV. Administrative Review
1. Executive Order 12886
2. Paperwork Reduction Act
3. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996
4. Unfunded Mandates Reform Act
5. Executive Order 13132: Federalism
6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use Compliance With Administrative Procedure Act
9. National Technology Transfer Advancement Act
10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

I. Potentially Affected Persons

Persons potentially affected by this action include those who seek or might seek permits or approval by EPA to dispose of dredged material into ocean waters pursuant to the Marine Protection Research and Sanctuaries Act, 33 U.S.C. 1401 *et seq.* EPA's action would be relevant to persons, including organizations and government bodies seeking to dispose of dredged material in ocean waters offshore of Terrebonne, Louisiana, the Mississippi River Gulf Outlet (MRGO) Canal, Louisiana, and Corpus Christi, Texas. Currently, the U.S. Army Corps of Engineers (Corps) and other persons with permits to use designated sites offshore Terrebonne, Louisiana, the Mississippi River Gulf Outlet (MRGO) Canal, Louisiana, and Corpus Christi, Texas would be most impacted by this final action. Potentially affected categories and persons include:

Category	Examples of potentially regulated persons
Federal government	USACE Civil Works and O & M projects; other Federal agencies, including the Department of Defense.
Industry and general public	Port authorities, marinas and harbors, shipyards and marine repair facilities, berth owners.

Category	Examples of potentially regulated persons
State, local and tribal governments	Governments owning and/or responsible for ports, harbors, and/or berths, Government agencies requiring disposal of dredged material associated with public works projects.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding persons likely to be affected by this action. For any questions regarding the applicability of this action to a particular entity, please refer to the contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

Section 102(c) of the Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, as amended, 33 U.S.C. 1401 *et seq.*, gives the Administrator of EPA the authority to designate sites where ocean disposal may be permitted. On October 1, 1986, the Administrator delegated the authority to designate ocean disposal sites to the Regional Administrator of the Region in which the sites are located. These proposed cancellations and modification are being made pursuant to that authority.

The EPA Ocean Dumping Regulations promulgated under MPRSA (40 CFR chapter I, subchapter H, § 228.11) state that modifications in disposal site use which involve withdrawal of disposal sites from use or permanent changes in the total specified quantities or types of wastes permitted to be discharged to a specific disposal site will be made by promulgation in this part 228. These site cancellations and modification of types of wastes permitted to be discharged to a specific disposal site are being published as proposed rulemaking in accordance with § 228.11(a) of the Ocean Dumping Regulations, which permits the withdrawal of designated disposal sites from use or changes in the total specified quantities or types of wastes permitted to be discharged to a specific disposal site based upon changed circumstances concerning use of the site.

III. Proposed Action

The proposed cancellation of the designations of these sites is needed as a housekeeping measure. In essence, these ODMDSs either are no longer a suitable disposal option or have no foreseeable need. The Houma ODMDS is now partially occupied by the Houma Navigational Canal. The U.S. Corps of Engineers has re-aligned the Cat Island Pass portion of the HNC several times since the construction of this federal navigation channel in order to retain a channel segment that requires little maintenance dredging due to the natural hydrodynamics in the vicinity. This particular portion of the HNC Cat Island Pass channel is characterized by an area of deeper water (erosional zone) that is moving westwards. Once this deeper water erosional zone has moved far enough west from the Corps's channel alignment that area of the channel begins to shoal (becomes a depositional zone). To avoid increased maintenance dredging costs, the Corps re-aligns this portion of the channel westwards to "keep up" with the deeper water zone as it continues to migrate westwards. The Houma ODMDS is located on the west side of this channel, and the deeper water zone has migrated into the ODMDS boundaries. The Houma ODMDS has not been used for more than twenty (20) years. Instead, dredged material from the HNC has been used beneficially under Section 404 of the Clean Water Act on the two (2) single point discharge (SPD) sites located within the ODMDS. It is the Corps' intention to continue this practice. As such, this type of placement is excluded by definition from regulation by MPRSA. De-designation of the Houma ODMDS will allow the Corps to expand the beneficial use of dredged material for the creation of durable islands for seasonal bird nesting areas regulated under Section 404 of the Clean Water Act.

The Mississippi River-Gulf Outlet (MRGO) ODMDS is no longer needed. On June 5, 2008 the Assistant Secretary of the Army for Civil Works forwarded the Final MRGO Deep-Draft De-authorization Report to Congress officially de-authorizing the MRGO from the Gulf Intercoastal Water Way (GIWW) to the Gulf of Mexico as a federal navigation project. The report also authorized the construction of a rock closure structure across MRGO which was completed in late July 2009.

The proposed modification of the period of use and use restriction on the Homeport Project ODMDS is needed to change the use of the site to include suitable dredged material from the greater Corpus Christi, Texas vicinity over an indefinite period of time. The Homeport Project ODMDS was designated to provide a disposal area for placement of suitable construction dredge material from the U.S. Navy's Homeport Project at Corpus Christi/Ingleside, Texas. The Homeport Project never materialized and therefore, the ODMDS was never used. Use of the ODMDS was limited to suitable dredged material from the Homeport Project over a 50 year period. There is a need for placement of construction dredged material from the Corpus Christi Channel Channel Improvement Project (CIP) as described in the Final Environmental Impact Statement (FEIS) for the *Corpus Christi Ship Channel Channel Improvements Project Corpus Christi and Nueces Bays, Nueces and San Patricio Counties, Texas* published in April 2003. Based on the FEIS, suitable dredged material will be placed beneficially in the location of the Homeport Project ODMDS under Section 404 of the Clean Water Act (CWA). CWA Section 404 has jurisdiction in the Territorial Sea or coastal waters from the baseline to three (3) nautical miles seaward. Because the Homeport Project ODMDS is located beyond the boundary of the Territorial Sea and in the open ocean, the CWA Section 404 does not have jurisdiction. As a result there is a need to change the use restriction placed on the Homeport Project ODMDS to include suitable dredged material from the greater Corpus Christi, Texas vicinity. Since dredged material placement at this ODMDS is expected to be an on-going process over many years, the period of use is being changed to continuing use. EPA also proposes to change the name of the Homeport Project ODMDS to Corpus Christi New Work ODMDS. The current name is no longer applicable since it was the name of the project at the time the ODMDS was designated.

IV. Administrative Review

1. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993) EPA must determine whether the regulatory action is "significant," and therefore subject to Office of Management and Budget (OMB) review and other requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(a) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities;

(b) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(c) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof: or

(d) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This Proposed Rule should have minimal impact on State, local, or Tribal governments or communities. Consequently, EPA has determined that this Proposed Rule is not a "significant regulatory action" under the terms of Executive Order 12866.

2. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and recordkeeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and recordkeeping requirements affecting ten or more non-Federal respondents be approved by OMB. Since the Proposed Rule would not establish or modify any information or recordkeeping requirements, but only clarifies existing requirements, it is not subject to the provisions of the Paperwork Reduction Act.

3. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

This proposed rule will not impose any requirements on small entities. The modification of the Homeport Project ODMDS broadens the use of the site providing an additional option for dredged material placement in the Corpus Christi, Texas vicinity. The removal of the Houma ODMDS will allow for the beneficial use of dredged material under CWA Section 404 for the creation of bird islands. The closing of the Mississippi River Gulf Outlet Navigation Channel was mandated by Congress and therefore the associated ODMDS is no longer needed. For these reasons, the Regional Administrator certifies, pursuant to section 605(b) of the RFA, that the Proposed Rule will not have a significant economic impact on a substantial number of small entities.

4. Unfunded Mandates Reform Act

This Proposed Rule contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) of 1995 (Pub. L. 104–4) for State, local, or tribal governments or the private sector that may result in estimated costs of $100 million or more in any year. It imposes no new enforceable duty on any State, local or tribal governments or the private sector nor does it contain any regulatory requirements that might significantly or uniquely affect small government entities. Thus, the requirements of section 203 of the UMRA do not apply to this Proposed Rule.

5. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This Proposed Rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." This Final Rule does not have Tribal implications, as defined in Executive Order 13175.

7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This Executive Order (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA. This Proposed Rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because EPA does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use Compliance With Administrative Procedure Act

This Proposed Rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

9. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. This Proposed Rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629) directs Federal agencies to determine whether the Proposed Rule would have a disproportionate adverse impact on minority or low-income population groups within the project area. The Proposed Rule would not significantly affect any low-income or minority population.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: April 2, 2014.

Samuel Coleman,

Deputy Regional Administrator, Region 6.

In consideration of the foregoing, EPA is proposing to amend part 228, chapter I of title 40 of the Code of Federal Regulations as follows:

PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended as follows:

■ a. By removing and reserving paragraphs (j)(1) and (4); and

■ b. By revising paragraphs (j)(16) introductory text and (j)(16)(v) and (vi) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(j) * * *

(16) Corpus Christi New Work ODMDS, Corpus Christi, Texas.

* * * * *

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Corpus Christi, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

* * * * *

[FR Doc. 2014–09008 Filed 4–18–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2013–0117; MO 92210–0–0008 B2]

RIN 1018–BA27

Endangered and Threatened Wildlife and Plants; Threatened Status for Lepidium papilliferum (Slickspot Peppergrass) Throughout Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Reconsideration of final rule; reopening of the comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the reconsideration of our final rule listing *Lepidium papilliferum* (slickspot peppergrass) as a threatened species throughout its range under the Endangered Species Act of 1973 (ESA or Act), published February 12, 2014. We published the reconsideration of the final rule in response to the Idaho District Court's remand because the Court asked us to reconsider the definition of the "foreseeable future" in regard to this particular species. We are seeking input on our interpretation of the foreseeable future as it pertains specifically to *L. papilliferum*. In addition, we also seek any new information regarding population status, trends, or threats that has become available since our last review of the status of the species in 2009. We are reopening the comment period to allow all interested parties an additional opportunity to comment. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of our final determination.

DATES: We are reopening the comment period on the revised proposed rule published in the **Federal Register** on February 12, 2014 (79 FR 8416). In order to fully consider and incorporate public comment in the final determination, we request submission of comments by June 5, 2014. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on that date.

ADDRESSES: *Document availability:* You may obtain copies of the reconsideration of final rule on the Internet at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2013–0117, or by mail from the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Comment submission: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. Search for FWS–R1–ES–2013–0117, which is the docket number for this rulemaking. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2013–0117; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Mike Carrier, State Supervisor, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; telephone 208–378–5243; facsimile 208–378–5262. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our reconsideration of the final rule listing *Lepidium papilliferum* (slickspot peppergrass) as a threatened species throughout its range that was published in the **Federal Register** on February 12, 2014 (79 FR 8416). Any final action regarding the listing of *L. papilliferum* will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, general public, and other interested parties concerning the reconsideration of the final listing rule and our interpretation of the foreseeable future as it applies specifically to *L. papilliferum*. We particularly seek comments regarding:

(1) Our interpretation of the term "foreseeable future" and its application to our evaluation of the status of *Lepidium papilliferum;*

(2) Our evaluation of new scientific information concerning the range, distribution, population size and trends, and threats to the species that has become available since publication of the 2009 final listing rule;

(3) Our choice of the threshold of 80 to 90 percent loss of remaining unburned habitat as the point at which the species will be in danger of extinction;

(4) Any additional scientific information concerning the range, distribution, population size and trends, or threats to the species that has become available since publication of the 2009 final listing rule that we have not already presented and considered; and

(5) Current or planned activities in the subject area that were not analyzed in the 2009 final listing rule and their possible effect on this species.

We will consider all comments and information received during the

comment period on this rulemaking during our preparation of a final determination. Comments previously submitted on the proposed listing of *Lepidium papilliferum* during any of the previous comment periods need not be resubmitted; they have already been incorporated into the public record and will be fully considered in the final decision.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include. In making a final decision on this matter, we will take into consideration the comments and any additional information we receive. Comments and materials received, as well as some of the supporting documentation used in the preparation of a final decision, will be available for public inspection on *http://www.regulations.gov*. All information we use in making our decision is available by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; telephone 208–378–5243; facsimile 208–378–5262 (see **FOR FURTHER INFORMATION CONTACT**).

Background

On October 8, 2009 (74 FR 52014), we published a final rule listing the plant *Lepidium papilliferum* (slickspot peppergrass) as a threatened species throughout its range under the Act. On November 16, 2009, Idaho Governor C. L. "Butch" Otter, the Idaho Office of Species Conservation, Theodore Hoffman, Scott Nicholson, and L.G. Davison & Sons, Inc., filed a complaint in the U.S. District Court for the District of Columbia challenging the 2009 final listing rule under the Administrative Procedure Act and the Endangered Species Act. Subsequently, the issue was transferred to the U.S. District Court for the District Court of Idaho. On August 8, 2012, the Court vacated the final rule listing *Lepidium papilliferum* as a threatened species under the Act, with directions that the case be remanded to the Service for further consideration consistent with the Court's opinion. *Otter* v. *Salazar,* Case No. 1:11–cv–358–CWD (D. Idaho).

The reconsideration of final rule that published on February 12, 2014 (79 FR 8416), constitutes our response to the issue remanded by the Court. In that document, we presented our interpretation of the term "foreseeable future" as it applies specifically to *Lepidium papilliferum*. Further, in applying our interpretation of the foreseeable future to the status evaluation for *L. papilliferum*, we concluded that threatened status should be reinstated for the species throughout its range. We initially opened a 30-day comment period in association with our reconsideration of the final rule listing *Lepidium papilliferum* as a threatened species; that comment period ended on March 14, 2014 (79 FR 8416). On February 13, 2014, we received a request from the Idaho Governor's Office of Species Conservation to extend the comment period an additional 45 days. We are reopening the comment period to allow the public additional opportunity to provide input on our reconsideration of the final listing rule and our interpretation of the foreseeable future as it applies specifically to *L. papilliferum*.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 7, 2014.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2014–09019 Filed 4–18–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2010–0071; 4500030114]

RIN 1018–AX16

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Lepidium Papilliferum

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Revised proposed rule; correction and reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the revised proposed rule to designate critical habitat for *Lepidium papilliferum* (slickspot peppergrass) under the Endangered Species Act (Act or ESA). In addition, we correct some minor errors in the revised proposed rule published on February 12, 2014. In total, approximately 24,808 hectares (61,301 acres) in Ada, Gem, Payette, Elmore, and Owyhee Counties in Idaho fall within the boundaries of the revised proposed critical habitat designation. We are reopening the comment period to allow all interested parties an opportunity to comment. Comments previously submitted need not be resubmitted, as they will be fully considered in the preparation of our final rule.

DATES: We are reopening the comment period on the revised proposed rule published in the **Federal Register** on February 12, 2014 (79 FR 8402). In order to fully consider and incorporate public comment in the final determination, we request submission of comments by June 5, 2014. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on that date.

ADDRESSES: *Document availability:* You may obtain copies of the revised proposed rule to designate critical habitat for *Lepidium papilliferum* on the Internet at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2010–0071, or by mail from the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Comment submission: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. Search for FWS–

R1–ES–2010–0071, which is the docket number for this rulemaking. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2010–0071; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Mike Carrier, State Supervisor, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; telephone 208–378–5243; facsimile 208–378–5262. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our revised proposed rule to designate critical habitat for *Lepidium papilliferum* (slickspot peppergrass) that published in the **Federal Register** on February 12, 2014 (79 FR 8402). Any final action regarding the designation of critical habitat for *L. papilliferum* will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, general public, and other interested parties on our revised proposed rule. We particularly seek comments concerning any new information pertaining to critical habitat for this species that has become available since the May 10, 2011, publication of our proposed rule to designate critical habitat for *Lepidium papilliferum* (76 FR 27184). Comments previously submitted on the proposed critical habitat designation need not be resubmitted; they have already been incorporated into the public record and will be fully considered in the final decision.

We particularly seek comments concerning the following:

(1) New scientific information regarding critical habitat for this species, including the addition of recently identified areas that meet our definition of critical habitat for the species that has become available since the May 10, 2011, publication of our proposed rule to designate critical habitat for *Lepidium papilliferum* (76 FR 27184); and

(2) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area in critical habitat under section 4(b)(2) of the Act, after considering both the potential impacts and benefits of the proposed critical habitat designation. Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We, therefore, request specific information on:

- The benefits of including recently identified areas in the final designation and supporting rationale;
- The benefits of excluding any recently identified areas from the final designation and supporting rationale; and
- Whether any specific exclusions may result in the extinction of the species and why.

We will consider all comments and information received during our preparation of a final designation of critical habitat for *Lepidium papilliferum.* Accordingly, the final decision may differ from the proposal.

Please note that comments merely stating support for or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(2) of the Act directs that the Secretary designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials by one of the methods listed in **ADDRESSES.** We request that you send comments only by the methods described in **ADDRESSES.** If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Please include sufficient information with your comments to allow us to verify any scientific information you include. Comments and materials received, as well as some of the supporting documentation used in the preparation of a final decision, will be available for public inspection on *http://www.regulations.gov.* All information we use in making our decision is available by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; telephone 208–378–5243; facsimile 208–378–5262 (see **FOR FURTHER INFORMATION CONTACT**).

Background

On October 8, 2009, we listed *Lepidium papilliferum* as a threatened species throughout its range under the Act (74 FR 52014). On November 16, 2009, Idaho Governor C. L. "Butch" Otter, the Idaho Office of Species Conservation, Theodore Hoffman, Scott Nicholson, and L.G. Davison & Sons, Inc., filed a complaint in the U.S. District Court for the District of Columbia challenging the 2009 final listing rule under the Administrative Procedure Act and the Endangered Species Act. Subsequently, the issue was transferred to the U.S. District Court for the District Court of Idaho (Court), and the parties involved consented to proceed before a Magistrate Judge. On August 8, 2012, the Court vacated the final rule listing *Lepidium papilliferum* as a threatened species under the Act, with directions that the case be remanded to the Service for further consideration consistent with the Court's opinion (*Otter* v. *Salazar,* Case No. 1:11–cv–00358–CWD (D. Idaho)).

During the period of the 2009 litigation, we published the 2011 proposed critical habitat rule (76 FR 27184, May 10, 2011); the comment period closed on July 11, 2011. On June 1, 2011, the Service received a request from Idaho's Governor C.L. "Butch" Otter requesting a 60 day extension to the comment period. On July 7, 2011, we published a notice extending the initial comment period through September 9, 2011 (76 FR 39807). We also requested comments on the proposed critical habitat designation and associated draft economic analysis during a second comment period that opened October 26, 2011, and closed on December 12, 2011 (76 FR 66250).

Rulemaking on the proposed critical habitat was suspended following the Court's ruling vacating the listing. However, on February 12, 2014, we published in the **Federal Register** a

document announcing our reconsideration of the listing of *Lepidium papilliferum* relative to the issues remanded by the Court (79 FR 8416); rulemaking on the listing has, therefore, been reopened. At that time, we also reopened the rulemaking on our proposed rule to designate critical habitat for the species, and presented some revisions to the proposed critical habitat (February 12, 2014; 79 FR 8402). We initially opened a 30-day comment period in association with our revised proposed rule to designate critical habitat for *L. papilliferum;* that comment period ended on March 14, 2014. On February 13, 2014, we received a request from the Idaho Governor's Office of Species Conservation to extend the comment period an additional 45 days. We are reopening the comment period to allow the public additional opportunity to provide input on our revised proposed rule to designate critical habitat for *L. papilliferum*. Elsewhere in today's **Federal Register**, we are concurrently reopening the comment period on our reconsideration of the final rule listing *L. papilliferum* as a threatened species throughout its range.

Corrections to the Revised Proposed Critical Habitat for Lepidium papilliferum

In this document, we correct some errors in our February 12, 2014, revised proposed rule to designate critical habitat for *Lepidium papilliferum* (79 FR 8402). On page 8404 of that revised proposed rule, in the third column under the section *Revised Critical Habitat Units,* the amounts of State and private lands included in the additional areas identified as critical habitat are incorrect. These areas are erroneously described as including 35 ha (87 ac) of State lands and 76 ha (188 ac) of private lands. The correct amounts should be 32 ha (80 ac) of State lands and 82 ha (203 ac) of private lands. The sentence in question should, therefore, read as follows: "The additional areas proposed for critical habitat include 1,588 ha (3,926 ac) of U.S. Bureau of Land Management (BLM) lands; 23 ha (58 ac) of Bureau of Reclamation (BOR) lands; 32 ha (80 ac) of State lands; and 82 ha (203 ac) of private lands (areas do not add precisely to 1,725 ha (4,261 ac) due to rounding)."

In addition, we did not explain that the addition of a single element occurrence in Unit 1 of the revised proposed critical habitat in Payette County actually extends the area of that unit into adjacent Gem County. The revised proposed critical habitat for *Lepidium papilliferum* is thus found in five (not four) counties in Idaho: Ada, Elmore, Gem, Owyhee, and Payette Counties. The map of Unit 1 published with the revised proposed critical habitat rule (79 FR 8402, p. 8408) correctly depicts the critical habitat unit as extending from Payette County across the county line into Gem County to incorporate a single element occurrence of *L. papilliferum*. The area of proposed critical habitat in Gem County is 16 ha (40 ac) of Federal (BLM) lands. The total acreage of Unit 1 is unchanged from the 289 ha (715 ac) identified in the revised proposed rule. However, of that amount, 273 ha (675 ac) are in Payette County, and 16 ha (40 ac) are in Gem County.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 10, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2014–09018 Filed 4–18–14; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 79, No. 76
Monday, April 21, 2014

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Information Collection, Volunteer Program

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) is requesting comments from all interested individuals and organizations on an extension with a revision of a currently approved information collection associated with the Volunteer Program.

DATES: We will consider comments that we receive by June 20, 2014.

ADDRESSES: We invite you to submit comments on this notice. In your comment, include volume, date and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to: *www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Ms. Shannon Logan, USDA, FSA, Human Resources Division, HCSPIB, 355 E Street SW., 12th Floor, Washington, DC 20024.

You may also send comments to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Copies of the information collection may be requested by contacting Shannon Logan at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Shannon Logan; (202) 401–0165.

SUPPLEMENTARY INFORMATION:

Title: Volunteer Program.

OMB Control Number: 0560–0232.

Expiration Date for Approval: September 30, 2014.

Type of Request: Extension and revision.

Abstract: Section 1526 of the Food and Agriculture Act of 1981 (7 U.S.C. 2272) permits the Secretary of Agriculture to establish a program ("the Volunteer Program") to use volunteers to perform a wide range of activities to carry out the programs of, or supported by, the Department of Agriculture. In addition, 5 U.S.C. 3111 grants agencies the authority to establish programs designed to provide educationally-related work assignments for students in non-pay status. For FSA's volunteer program, each volunteer must follow the same responsibilities and guidelines for conduct that Federal government employees are expected to follow. The volunteers, who are mainly students participating in the sponsored volunteer program, must complete a service agreement, attendance records, and other forms, and provide the required supporting documents. This collected information will allow FSA to effectively recruit, train, and accept volunteers to carry out programs supported by the Department of Agriculture, therefore benefitting volunteers, the Department of Agriculture, and the general public.

Without the collected information, FSA will be unable to document the services provided by the volunteers. FSA will report the collected information to offices within the Department of Agriculture and the Office of Personnel Management that request information on the Volunteer Program.

This information collection will continue to use the volunteer attendance record (Form AD–2025) and travel times. Also, the three service agreement forms (Forms AD–2022, AD–2023, and AD–2024) are being replaced with Form OF301a, the Volunteer Service Agreement. Together, the remaining forms will provide the information FSA requires. Consequently, burden hours are being reduced in this request.

Estimate of Burden: Public reporting burden for this information collection is estimated to average 15 minutes per response. The average travel time to a USDA Service Center office to complete the forms is included in the total annual burden, and is estimated to be 1 hour per respondent.

Estimated Number of Respondents: 30.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual of Reponses: 30.

Estimated Total Annual Burden hours: 15.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice, including names and addresses when provided, will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Signed on April 15, 2014.

Juan M. Garcia,

Administrator, Farm Service Agency.

[FR Doc. 2014–09000 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2014–0009]

Notice of Request for a New Information Collection: Meat Slaughter Industry Survey

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to request a new information collection for a survey of the meat slaughter industry.

DATES: May 21, 2014.

ADDRESSES: FSIS invites interested persons to submit comments on this

proposed rule. Comments may be submitted by one of the following methods:

- Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov*. Follow the on-line instructions at that site for submitting comments.
- Mail, including CD–ROMs, etc.: Send to Docket Room Manager, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163B, Washington, DC 20250–3700.
- Hand- or courier-delivered submittals: Deliver to Patriots Plaza 3, 355 E. Street SW., Room 8–163B, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2014–0009. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov*.

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW., Room 6067, South Building, Washington, DC 20250; Telephone: (202) 690–6510.

SUPPLEMENTARY INFORMATION:

Title: Meat Slaughter Industry Survey.

Type of Request: New information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary of Agriculture (7 CFR 2.18, 2.53) as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*). FSIS protects the public by verifying that meat and poultry products are wholesome, not adulterated, and properly marked, labeled, and packaged.

FSIS plans to request a new information collection to conduct a new survey of the meat slaughter industry. In 2004, FSIS conducted a survey of the meat slaughter industry to collect information on food safety practices and technologies. This was part of a broader FSIS effort to survey poultry slaughter, meat and poultry processing, and egg products industries from 2003 to 2006. FSIS needs to survey the meat industry again so that the Agency has current information on industry practices for conducting regulatory impact analyses as required by OMB.

In this currently planned survey of meat slaughter establishments, FSIS will collect data to provide the most accurate, up-to-date information on industry practices and use of technologies. The information gathered through the meat slaughter industry survey will provide FSIS with reliable and valid information regarding food safety practices in FSIS-regulated establishments; the Agency will use this information to estimate costs in regulatory impact analyses. FSIS also will use the survey data to evaluate the effectiveness of its meat inspection program and to conduct analyses to assess the industry's food safety technologies, sanitation practices, microbiological testing practices, and recall readiness. The results will also be used in conjunction with the results of the 2004 meat slaughter industry survey to analyze trends in food safety practices and technologies over time. FSIS has made the following estimates on the basis of an information collection assessment.

Estimate of Burden: FSIS estimates that it will take each respondent 60 minutes and each non-respondent 12 minutes to participate in the survey.

Respondents: Official meat slaughter establishments.

Estimated No. of Respondents: 417 respondents and 173 non-respondents.

Estimated No. of Annual Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 451.6 hours. Copies of this information collection assessment can be obtained from Gina Kouba, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW., Room 6077, South Building, Washington, DC 20250; Telephone: (202) 690–6510.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/federal-register*.

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/subscribe*. Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at 202–720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call 202 720–5964 (voice and TTY). USDA is an

equal opportunity provider and employer.

Done at Washington, DC, on April 15, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–08961 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2013–0038]

Best Practices Guidance for Controlling Listeria monocytogenes in Retail Delicatessens

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of availability; request for public comments.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of the "FSIS Best Practices Guidance for Controlling *Listeria monocytogenes* (*Lm*) in Retail Delicatessens." The best-practices guidance discusses steps that retailers can take to prevent listeriosis associated with the consumption of certain ready-to-eat (RTE) foods that are prepared or sliced in retail delicatessens (delis) and consumed in the home, such as deli meats and deli salads. FSIS encourages retailers to review the guidance and evaluate the effectiveness of their retail practices and intervention strategies in reducing the risk of listeriosis to consumers from RTE meat and poultry deli products. The Agency will consider all comments submitted and will revise the best-practices guidance as necessary.

DATES: Comments on the best-practices guidance should be submitted on or before June 20, 2014.

ADDRESSES: A downloadable version of the compliance guide is available to view and print at *http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/compliance-guides-index*. No hard copies of the best-practices guidance have been published.

FSIS invites interested persons to submit comments on the best-practices guidance. Comments on the best-practices guidance may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov*. Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Room Manager, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163B, Washington, DC 20250–3700.
- *Hand-or courier-delivered submittals:* Send to Docket Room Manager, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 355 E Street SW., Room 8–163B, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2013–0038. Comments received in response to this notice will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov*.

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495, or by Fax: (202) 720–2025.

SUPPLEMENTARY INFORMATION:

Lm is a bacterium that is found in moist environments, soil, and decaying vegetation and can persist along the food continuum. Transfer of the bacterium from the environment (*e.g.*, deli cases, slicers, and utensils), employees, or contaminated food products is a particular hazard of concern in RTE foods, including meat and poultry products, because they generally receive no further processing for food safety before consumption. Listeriosis is a serious infection usually caused by eating food contaminated with *Lm*.

To help minimize the public health burden of listeriosis, FSIS and the U.S. Food and Drug Administration (FDA) conducted an interagency risk assessment to better understand the risk of foodborne illness associated with eating certain RTE foods prepared in retail delis and developed recommendations for changes in current practices that may improve the safety of those products. On May 13, 2013, FSIS and FDA made their findings available to the public in the draft "Interagency Risk Assessment—*Listeria monocytogenes* in Retail Delicatessens" (Interagency Retail *Lm* Risk Assessment) (78 FR 27939; May 13, 2013). FSIS and FDA finalized the risk assessment in September 2013, and the updated document is available on FSIS's Web site at *http://www.fsis.usda.gov/wps/portal/fsis/topics/science/risk-assessments*.

The key findings of the Interagency Retail *Lm* Risk Assessment include the following:

- Storage temperature. If all refrigerated RTE foods are stored at 41 degrees Fahrenheit (5 °C) or below, as the 2013 FDA Food Code (3–501.16(A)(2)) recommends, at least nine percent of predicted listeriosis illnesses caused by contaminated deli products prepared or sliced in the retail deli could be prevented.
- Growth inhibitors. If all deli products that support *Lm* growth were reformulated to include a growth inhibitor, 96 percent of predicted listeriosis illnesses caused by RTE products prepared or sliced in the retail deli could be prevented.
- Control Cross-contamination. The predicted risk of listeriosis dramatically increases in retail delis as a result of cross-contamination. Slicers, in particular, are key sources of cross-contamination in retail delis. Eliminating all points of cross-contamination in the deli (including slicers) would decrease the predicted risk of illness from the consumption of RTE products prepared or sliced in the retail deli by approximately 34 percent.
- Control Contamination at its Source. Increased levels of *Lm* from incoming products and the environment (including potential niches), directly increase the predicted risk of illness. Therefore, elimination of environmental niches in the deli area will reduce the predicted risk of listeriosis from the consumption of RTE products prepared or sliced in the retail deli. Additionally, if levels of *Lm* on RTE foods (including foods that do not support the growth of *Lm*) that the retail deli receives from processing establishments were reduced by half, approximately 22 percent of the predicted listeriosis illnesses caused by contaminated deli products could be prevented.
- Continue Sanitation. Sanitation practices that eliminate *Lm* from food-contact surfaces reduce the predicted *Lm* levels in the deli area. Employees not wearing gloves while serving customers increases the predicted risk of listeriosis from the consumption of RTE products prepared or sliced in the retail deli by approximately five percent.

Using these key findings along with available scientific knowledge, the 2013

FDA Food Code, and lessons learned from controlling *Lm* in FSIS-inspected meat and poultry processing establishments, FSIS developed the "FSIS Best Practices Guidance for Controlling *Listeria monocytogenes* (*Lm*) in Retail Delicatessens," which provides practical recommendations that retailers can use to control *Lm* contamination and outgrowth in the deli. Retailers can use the best-practices guidance to help ensure that RTE meat and poultry products in the deli area are handled under sanitary conditions and are not adulterated under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) or the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) (*see* 21 U.S.C. 623(d) and 464(e)). While these practices are specifically designed to control *Lm*, they also may help control other foodborne pathogens that may be introduced into the retail deli environment and other facilities where consumers take possession of food.

The best practices are grouped in four sections: (1) Product and product handling, (2) cleaning and sanitizing, (3) facility and equipment controls, and (4) employee practices. Practices identified by the Interagency Retail *Lm* Risk Assessment that can significantly decrease the predicted risk of foodborne illness are highlighted in each section. The other practices that are based on scientific knowledge or lessons learned by FSIS are also included to help retailers increase *Listeria* control in the deli area. A self-assessment tool is provided for deli operators to help them identify the best practices they are using and to assess the need to adopt others. By following the best practices in the guidance and the 2013 FDA Food Code, retailers can help ensure that RTE products are not adulterated with *Lm*, and that the potential for listeriosis is decreased.

FSIS has posted the best-practices guidance on its Web page (*http://www.fsis.usda.gov/wps/wcm/connect/29d51258-0651-469b-99b8-e986bace8a54/Controlling-LM-Delicatessens.pdf?MOD=AJPERES*) and is requesting comments on the guidance. It is important to note that the best-practices guidance does not replace the 2013 FDA Food Code or FSIS regulations. The best-practices guidance sets out recommendations rather than requirements. The Agency will consider all comments submitted and will revise the best-practices guidance as necessary.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/federal-register.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals and other individuals who have asked to be included. The Update is available on the FSIS Web page. Through the Listserv and the Web page, FSIS is able to provide information to a much broader and more diverse audience.

In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done in Washington, DC on: April 1, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–08955 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2013–0029]

Availability of FSIS Compliance Guidelines for Allergens and Ingredients of Public Health Concern: Identification, Prevention and Control, and Declaration Through Labeling

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of availability and opportunity for comment.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of guidance on allergens and other ingredients of public health concern that provides recommendations for identifying hazards when conducting a hazard analysis and to prevent and control hazards through hazard analysis and critical control point (HACCP) plans or Sanitation standard operating procedures (SOPs) or other prerequisite programs with respect to these substances. The emphasis of the guidelines is on meat and poultry products. The guidelines represent the best practice recommendations of FSIS, based on scientific and practical considerations. By following these guidelines, establishments are likely to ensure that product labels declare all ingredients, as required in the regulations, and that the product does not contain undeclared allergens or other undeclared ingredients.

DATES: The Agency must receive comments by June 20, 2014.

ADDRESSES: A downloadable version of the compliance guide is available to view and print at *http://www.fsis.usda.gov/Regulations_&_Policies/Compliance_Guides_Index/index.asp.* No hard copies of the compliance guide have been published.

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by either of the following methods:

Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov/.* Follow the online instructions at that site for submitting comments.

Mail, including CD–ROMs: Send to Docket Room Manager, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163B, Washington, DC 20250–3700.

Hand- or courier-delivered submittals: Deliver to Patriots Plaza 3, 355 E Street SW., Room 8–163B, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2013–0029. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or to comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495, or by Fax: (202) 720–2025.

SUPPLEMENTARY INFORMATION: Under the Acts, meat and poultry products that contain an allergen that is not declared on the product label are adulterated because, to individuals who are allergic to the allergen, the products bear or contain a poisonous or deleterious substance (21 U.S.C. 453(g)(1) and 601(m)(1)).

Also under the Acts, meat and poultry products are misbranded if the labeling on the products is false or misleading in any particular (21 U.S.C. 601(n)(1) and 453(h)(1)). To prevent meat and poultry products from being misbranded, FSIS regulations require a listing of all ingredients on the labels of products (9 CFR 317.2(f)(1) and 381.118(a)(1)).

In recent years (2008–2012), there has been a sustained increase in the number of recalls of FSIS-regulated products that contained undeclared allergens. These recalls are preventable, as many have been due to ingredient changes, product changes, products in the wrong package, or products with misprinted labels. The Agency is issuing these guidelines to provide meat and poultry establishments with recommendations on how to identify hazards with respect to allergens and other ingredients of public health concern when conducting their hazard analysis, prevent and control these hazards through HACCP plans, Sanitation SOPs, or other prerequisite programs, and properly declare allergens in product. These guidelines also provide information on proper procedures for processing, handling, storing, and labeling a product with an allergenic ingredient or ingredient of public health concern. Although the guidelines set out recommendations rather than requirements, FSIS encourages establishments to follow this guidance. The guidelines represent FSIS's thinking, and FSIS will update it as necessary to reflect comments received any additional information that becomes available.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/federal-register.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/wps/portal/fsis/programs-and-services/email-subscription-service.* Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC on: April 1, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–08956 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2012–0007]

HACCP Plan Reassessment for Not-Ready-To-Eat Comminuted Poultry Products and Related Agency Verification Procedures

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice; response to comments.

SUMMARY: The Food Safety and Inspection Service (FSIS) is responding to comments on a **Federal Register** notice, "HACCP Plan Reassessment for Not-Ready-to-Eat (NRTE) Comminuted Poultry Products and Related Agency Verification Procedures," that it published on December 6, 2012. The notice provided updated information on the Agency's sampling and testing of these products, and on how it is verifying that establishments are effectively addressing the possible presence of *Salmonella* and *Campylobacter* in them.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495 or by Fax: (202) 720–2025.

SUPPLEMENTARY INFORMATION:

Background

In the December 6, 2012, **Federal Register** notice (77 FR 72686), FSIS informed establishments producing NRTE ground or otherwise comminuted chicken and turkey products that they must reassess their Hazard Analysis and Critical Control Point (HACCP) plans for these products. The Agency also described how it would determine whether the association of NRTE meat or poultry product with an illness outbreak would make subsequently-produced "like" product adulterated. FSIS announced that it would expand its *Salmonella* sampling beyond ground chicken and turkey to include all forms of non-breaded, non-battered comminuted NRTE chicken or turkey product not destined for further processing into ready-to-eat (RTE) products. Finally, FSIS announced that it intended to use the sampling results to determine the prevalence of *Salmonella* and *Campylobacter* in NRTE comminuted chicken and turkey and to

develop pathogen reduction performance standards for these products.

In response to an industry request for more time to comment, on March 7, 2013, FSIS extended the original comment period for the December 2012 notice by 45 days, until April 20, 2013 (78 FR 14635). Also on March 7, 2013, FSIS stated in the notice that establishments that produced NRTE comminuted chicken or turkey products would have to reassess their HACCP plans for those products by April 20, 2013, thereby providing them an additional 45 days to conduct the reassessment. Finally, FSIS announced that it would announce any new standards in the **Federal Register** and request comment on them before implementing them.

FSIS requested comment on the notice concerning the required reassessment and new sampling to inform FSIS's planned sampling procedures, to gather information on how best to establish pathogen reduction performance standards for NRTE comminuted chicken and turkey products, and to gather any other necessary information on how best to move forward with addressing *Salmonella* and *Campylobacter* in comminuted poultry products.

On May 8, 2013, FSIS issued instructions to its inspectors to begin verifying whether establishments had reassessed their HACCP plans (FSIS Notice 33–13; *http://www.fsis.usda.gov/wps/wcm/connect/12ab8084-1641-4e9a-ba3c-c647afe7e428/33-13_447.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=12ab8084-1641-4e9a-ba3c-c647afe7e428*). From the available data concerning establishment production and inspection task procedures from the Public Health Information System (PHIS) and from District Offices, FSIS found that about 70 percent of inspection personnel at establishments producing raw and not-heat-treated NRTE ground or otherwise comminuted chicken or turkey product verified that the establishments had reassessed their HACCP plans for these products in light of the outbreak information provided in the December 2012 notice. Inspection personnel found that about 90 percent of the establishments at which verification occurred had complied with the reassessment requirements. Most of the establishments that had not reassessed were very low volume (less than 1,000 pounds average production of product subject to comminuted poultry sampling) and not included in the sampling frame for this product.

FSIS found that only 30 percent of inspection personnel verified whether establishments producing heat-treated NRTE comminuted chicken or turkey products had reassessed their HACCP plans for these products. Inspection personnel have had questions about whether reassessment is required for such products and have had questions concerning whether the poultry components of these heat-treated products have received a full lethality treatment or are comminuted. If the products themselves, or the comminuted poultry component of such products, receive a full lethality, they would not be subject to the HACCP plan reassessment requirement.

District Offices will work with inspection program personnel to ensure that they verify whether all establishments required to reassess HACCP plans for NRTE comminuted (including ground) chicken or turkey product do so. In addition, FSIS intends to prioritize completion of Food Safety Assessments (FSAs) in establishments producing NRTE comminuted chicken or turkey product. During an FSA, if an Enforcement Investigations and Analysis Officer (EIAO) finds that an establishment producing such product has not reassessed its HACCP plan and should have done so, the EIAO will inform inspection program personnel at the establishment. Those personnel will then inform the establishment that it needs to reassess its HACCP plan for this product. If an establishment does not perform reassessment after it is advised to do so, FSIS will issue a noncompliance record. FSIS will post on its Web site an update on what it finds on the status of reassessments through the poultry checklist, discussed below. In addition, FSIS will prepare and post a report on what it has learned about the reassessments from the FSAs that EIAOs have conducted.

FSIS began the new Agency sampling and testing of raw comminuted chicken and turkey products on June 1, 2013 (FSIS Notice 35–13; *http://www.fsis.usda.gov/wps/wcm/connect/366615fa-923b-4d9a-954d-c6ad30ea3242/35-13.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=366615fa-923b-4d9a-954d-c6ad30ea3242*). This sampling and testing for Salmonella and Campylobacter does not include heat-treated NRTE comminuted chicken or turkey. FSIS is analyzing the results of the new sampling and testing. FSIS has posted aggregate results of this testing for all finished products as part of its quarterly report on *Salmonella*.[1]

[1] *http://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/microbiology/quarterly-reports-salmonella/quarterly-progress-reports.*

FSIS intends to continue the current sampling program until the new *Salmonella* and *Campylobacter* pathogen performance standards are implemented. FSIS intends to derive the new standards based on a risk assessment that takes into account the prevalence and distribution of *Salmonella* and *Campylobacter* in NRTE comminuted chicken and turkey product and the predicted illnesses averted as a consequence of reducing the prevalence of these pathogens. FSIS will estimate prevalence when it has collected enough data to develop standards.

Until FSIS establishes pathogen reduction performance standards for comminuted chicken and turkey, FSIS recommends that establishments increase their awareness of the pathogen incidence in these products and compare the on-going incidence in their establishments against the results made public by FSIS. In addition to the posted results, FSIS intends to provide each establishment whose product the Agency samples with periodic status reports comparing that establishment's results with those industrywide. FSIS advises establishments to make necessary changes in their procedures to control *Salmonella* and *Campylobacter*, particularly if FSIS finds that the levels of these pathogens in their comminuted products are higher than those in similar products of most other establishments or higher than the standard.

If establishments implement pathogen control procedures and conduct their own verification testing, FSIS advises them to compare their results to FSIS results and to make necessary changes to control the pathogens if their results are higher than the results of FSIS's testing in most other establishments or the FSIS standard. As has been the Agency's practice since February 2006, when it first began encouraging establishments to gain more optimal and consistent process control by attaining Category 1 status (i.e., half the current number of acceptable positive samples in a sample set), FSIS continues to encourage establishments to gain more optimal and consistent process control by achieving test results that are better than those for most other establishments, and that are lower than the FSIS standard.

At this time, not all establishments apply antimicrobial treatments to the source materials used for producing comminuted poultry, including mechanically separated product. FSIS is, therefore, revising its FSA Tools to ensure that EIAOs verify that establishments adequately address

Salmonella and *Campylobacter* in comminuted poultry, including mechanically separated product, in their hazard analysis and food safety system.

Consistent with plans announced in the December 2012 **Federal Register** notice, FSIS is surveying its poultry inspection program personnel through a PHIS profile extension questionnaire during the first half of Fiscal Year (FY) 2014 to gather specific information on changes made to HACCP plans in response to the required reassessment (77 FR 72686, at 72689). FSIS will evaluate the information gathered from the questionnaires to determine what hazards the Agency needs to consider in establishments that produce NRTE comminuted chicken and turkey products, and that FSIS needs to target in industry-wide FSAs of comminuted poultry operations. Similarly, if any of the testing data show high numbers of *Salmonella* positives within an establishment, or high levels of *Salmonella* through enumeration, FSIS may conduct a for-cause FSA at the establishment that produced the product or increase verification testing or inspection procedures at the establishment, such as sanitary dressing procedures, until the establishment controls pathogens on the source materials and food contact equipment. For slaughter operations, FSIS may slow down the evisceration line if conditions, including contamination resulting from a lack of process control, are preventing inspection personnel from adequately performing inspection procedures within the time available (9 CFR 381.68(c)).

FSIS announced its *Salmonella* Action Plan on December 4, 2013.[2] According to the plan, FSIS intends to complete a risk assessment and develop *Salmonella* performance standards for comminuted poultry this fiscal year. FSIS also intends to announce and request comment in the **Federal Register** on the setting of pathogen reduction performance standards for *Salmonella* and *Campylobacter* during this fiscal year for poultry parts and comminuted poultry. FSIS will then analyze the comments and announce final standards in a subsequent **Federal Register** notice and would provide time for establishments to make any changes to their procedures before assessing whether establishments meet the new standards. FSIS is analyzing the testing data discussed above to develop proposed new standards.

Summary of Comments and Responses

FSIS received 22 comments in response to the December 2012 notice. Of those comments, one was a joint submission signed by eight consumer advocacy groups, and another was from a coalition of six trade associations on behalf of their member companies. The remaining individual comments were from private citizens, domestic poultry processors, trade associations, industry advocacy associations, a consumer advocacy organization, a food marketing company, a private foreign consulting agency, and a member of academia. FSIS has summarized and responded to the comments below.

Administrative Procedure Act

Comment: One comment claimed that the Agency is violating the Administrative Procedure Act by effectively promulgating new regulatory requirements without following notice and comment procedures.

Response: The notice did not establish any new requirements. The December 2012 **Federal Register** notice was based on the Agency's determination that changes had occurred that could affect establishments' hazard analysis for comminuted poultry products because of the outbreaks and recalls described in the December 2012 notice. Therefore, as FSIS explained in the March 7, 2013 **Federal Register**, the predicate for triggering the reassessment required under 9 CFR 417.4 (a)(3) clearly existed (78 FR 14635). FSIS provided recommendations on issues establishments should consider during the reassessment but did not require establishments to consider those specific issues.

Although FSIS did not set new requirements for industry, the Agency provided a comment period. In addition, before beginning new sampling or verifying that establishments had reassessed their HACCP plans, FSIS delayed implementation to carefully consider issues that were raised in comments.

Definition of NRTE Comminuted Poultry

Comment: Several comments commended FSIS for expanding its *Salmonella* verification sampling program to include previously untested forms of NRTE comminuted poultry products and for taking actions to assess the prevalence of *Salmonella* and *Campylobacter* in these products. However, a turkey processor remarked that the Agency's definition for NRTE comminuted poultry is "excessively broad." Instead of the term "comminuted," several comments stated that FSIS should maintain its current use of the terms "mechanically separated," as defined in 9 CFR Part 381, and "ground" when implementing the new sampling.

Response: FSIS considers "NRTE comminuted poultry" to be any NRTE chicken or turkey product that has been ground, mechanically separated, or hand- or mechanically deboned and further chopped, flaked, minced or otherwise processed to reduce particle size (77 FR 72687). FSIS developed this definition to encompass not only ground and mechanically separated poultry products but also other similarly produced products across the spectrum of comminuted poultry products, including those with ingredients added during the comminution process, because production of any NRTE comminuted poultry involves similar processes that make them susceptible to the same hazards. FSIS had not previously included mechanically separated product or other comminuted product in its ground poultry sampling frame. By expanding the sampling frame to include all raw comminuted products, FSIS can verify that establishments are adequately controlling hazards in products produced by similar processes.

HACCP Plan Reassessment

Comment: Several comments supported HACCP plan reassessment for establishments producing NRTE comminuted chicken and turkey to take into account recent *Salmonella* outbreaks. Conversely, a domestic chicken processor and several trade associations objected to the required reassessment because FSIS failed to provide evidence in the notice that a food safety hazard has historically occurred or is reasonably likely to occur in the production of all NRTE comminuted poultry products. Several comments stated that the ground turkey products recalled in 2011, discussed in the December 2012 notice, contained no mechanically separated turkey.

Response: Although one outbreak and a subsequent recall discussed in the December 2012 notice involved only ground turkey products, the 2011 *Salmonella* Heidelberg outbreak[3] (FSIS Recall Case #060–2011)[4] discussed in

[2] *http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/foodborne-illness-and-disease/salmonella/sap.*

[3] A total of 79 persons infected with the outbreak strain of *Salmonella* Heidelberg were reported from 26 states between March 1 and August 3, 2011.

[4] Information on this recall and others can be found on the FSIS Web page (*http://www.fsis.usda.gov*), through the "FSIS Recalls" link, under the recall case number.

the notice was specifically associated with mechanically separated turkey source materials. Furthermore, all comminuted products undergo similar processing and, for that reason, are susceptible to the same hazards. Comminuting intact NRTE chicken or turkey spreads any surface contamination throughout the finished product. Thus, FSIS required reassessment of HACCP plans for all NRTE comminuted chicken and turkey products, including ground, hand- or mechanically-deboned, and mechanically separated product.

Importantly, on January 10, 2014, FSIS announced a product recall (FSIS Recall Case #001–2014) involving NRTE mechanically separated chicken, linked to an outbreak, that was sold for institutional use.

FSIS Salmonella Verification Sampling Program Procedures

Comment: One comment requested that FSIS exempt from sampling and testing raw comminuted poultry and turkey source materials destined for High Pressure Processing (HPP). If the materials were not exempted from sampling and testing by FSIS, the commenter requested that establishments using HPP be granted the benefit of having product sampled in its final, packaged form, after the HPP Critical Control Point.

Response: Any chicken or turkey product treated with an intervention or antimicrobial treatment, including HPP, that has been validated to achieve at least a 7-log reduction of *Salmonella* in poultry product would be considered RTE and exempt from FSIS *Salmonella* verification sampling. (Raw meat product would need a 5-log reduction of *Salmonella* to be exempt from FSIS *Salmonella* testing.) The HACCP plan reassessment requirement announced in the December 2012 **Federal Register** notice did not apply to HACCP plans for RTE chicken or turkey products. FSIS generally attempts to sample product after the product has received all antimicrobial treatments. In the case of HPP, which oftentimes is applied off-site at another establishment, if controls are in place to ensure that the antimicrobial treatment is applied to the product, FSIS would attempt to sample product at the off-site locale after the antimicrobial treatment is applied.

Comment: An industry advocacy association stated that the shifting to a 325-gram sample method will impair FSIS's and stakeholders' ability to compare historical and newly-generated data. The comment also requested that FSIS demonstrate how it validated a sampling methodology for poultry based on the larger sample size.

Response: FSIS agrees that comparing data generated before and after a microbiologic method change may be difficult. However, the 325-gram analytic portion will provide FSIS and industry with a more accurate estimate of the presence of *Salmonella* and *Campylobacter* in the products tested. The larger analytic portion size will also likely provide FSIS with a clearer picture of *Salmonella* serotype distribution. This increased understanding will assist FSIS with foodborne illness source attribution and outbreak traceback investigations.

To support an increase in the sample size analyzed, FSIS conducted studies to verify the performance characteristics (selectivity, sensitivity, reproducibility) of the FSIS *Salmonella* detection method (FSIS Microbiology Laboratory Guidebook Chapter 4.06) for poultry and found no significant difference between 25-gram and 325-gram analytical sample portions.

Comment: A trade association recommended that FSIS require safe handling and cooking instructions on all domestic and exported NRTE comminuted poultry product labels. The commenter also recommended that FSIS require all mechanically separated poultry products to be processed into RTE products. Other commenters recommended that FSIS establish additional labeling requirements for NRTE comminuted products such as, "For Export Only," "Must Be Fully Cooked to a Temperature of 165 °F (74 °C)," "Not for Retail Sale," and stating the intended use of the product (NRTE or RTE) on the label.

Response: Safe handling instructions are required to appear on the labels of raw or partially cooked NRTE poultry products (9 CFR 381.125(b)). The remaining labeling and processing requirements suggested by the commenters would require rulemaking and are outside the scope of this notice. However, establishments can voluntarily include validated cooking instructions or statements of limited use on product labels.

This January, FSIS sought input from the National Advisory Committee on Meat and Poultry Inspection [5] to explore possible changes to the safe food handling label on meat and poultry packages. With this input, FSIS will consider whether the current safe handling instruction requirements should be changed to meet the needs of the consuming public (78 FR 77643; Dec. 24, 2013).

Estimating Prevalence

Comment: Several consumer advocacy organizations asked how the Agency intends to use its verification testing program to determine prevalence when, in April 2012, FSIS said it was not possible to estimate prevalence accurately by using its *Salmonella* verification data.

Response: To estimate prevalence in NRTE comminuted poultry products, FSIS has replaced its traditional sampling-set approach with a census-type approach where each establishment is sampled continuously. This change will allow estimation of the average prevalence in each establishment across the sampling period. In addition, post-hoc adjustments for production volume will allow for national *Salmonella* and *Campylobacter* prevalence estimation.

Comment: A consumer advocacy organization stated that, to get an accurate estimate of the national prevalence of *Salmonella,* FSIS must sample from all establishments producing NRTE comminuted poultry products, not just establishments in Category 3. Several comments recommended that the new sampling of comminuted chicken and turkey span at least one year to account for seasonality when estimating prevalence. An industry advocacy organization stated that this sampling program must have enough samples taken across the seasons to be statistically significant.

Response: To estimate prevalence, FSIS is sampling eligible NRTE comminuted poultry product from all establishments producing it, regardless of category status. As stated above, FSIS is now analyzing the results of the new sampling and testing.

To address comments received on seasonality, FSIS analyzed *Salmonella* verification sampling data from 2000–2010 and found no significant seasonal patterns for either ground chicken or ground turkey. Accordingly, FSIS disagrees that the exploratory sampling period must span at least one year to account for seasonality. Furthermore, the existing pathogen reduction performance standards from the mid-1990s for both ground chicken and ground turkey are based on prevalence data collected over a period of approximately three to four months.[6]

[5] For more information on the National Advisory Committee on Meat and Poultry Inspection, visit *http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/advisory-committees/nacmpi.*

[6] *http://www.fsis.usda.gov/OPHS/baseline/rwgrchck.pdf and http://www.fsis.usda.gov/OPHS/baseline/rwgrturk.pdfhttp://www.fsis.usda.gov/OPHS/baseline/rwgrturk.pdf,* respectively.

However, FSIS will use at least 6 months of data on comminuted chicken and turkey to assess prevalence and developing standards.

New Performance Standards

Comment: Many comments requested separate performance standards for NRTE mechanically separated versus ground products because of the differences in how each product category is produced, marketed, and used. An industry advocacy association stated that a performance standard is not necessary for mechanically separated chicken products because mechanically separated chicken is only sold for inclusion in items that are fully cooked before sale to consumers.

Response: FSIS will develop separate *Salmonella* (and possibly *Campylobacter*) pathogen reduction performance standards for both chicken and turkey. Before determining whether to develop different pathogen reduction performance standards for different categories of NRTE comminuted poultry product, FSIS must consider the prevalence data for these categories that will be generated during its sampling program. If the data support doing so, FSIS may develop separate pathogen reduction performance standards for mechanically separated chicken and turkey. Although FSIS agrees that products that contain mechanically separated turkey now, after the August 3, 2011, recall, are typically sold to consumers fully-cooked, FSIS is aware of multiple establishments that produce NRTE products that contain mechanically separated chicken destined for sale to consumers as raw product. As noted earlier, the early January 2014 recall of mechanically separated chicken was marketed as NRTE for institutional use and was associated with numerous illnesses. Importantly, FSIS is aware that both mechanically separated turkey and mechanically separated chicken are marketed for export as NRTE product. FSIS is working with the poultry industry to better ensure that this type of product is produced under control programs that ensure consistent pathogen reduction in the product.

Comment: A consumer advocacy organization suggested that FSIS set a performance standard that is no greater than 12.3 percent for NRTE comminuted turkey products to reflect recent National Antimicrobial Resistance Monitoring System (NARMS) data. A domestic processor requested that the new performance standard be rolled out over two years to allow for modifications in sampling methodologies.

Response: FSIS will base its estimate of the prevalence of *Salmonella* and *Campylobacter* in NRTE comminuted poultry products on the data collected during the sampling program, while considering other relevant data sources, including NARMS. As noted above, FSIS will announce any new pathogen reduction performance standards in the **Federal Register** and request comment on them before finalizing. In addition, before implementing the standards, FSIS will provide establishments with sufficient time to make any necessary changes to address the standards.

Adulterated Product

Comment: Several consumer advocacy organizations asked FSIS to declare specific strains of *Salmonella* adulterants. They noted the Agency's recent determination that certain strains of pathogenic *Escherichia coli* (*E. coli)* are adulterants. Another comment stated that FSIS should declare as an adulterant any *Salmonella* serotype that appears on the Center for Disease Control's "top 20" list of *Salmonella* serotypes of human health concern at *http://www.cdc.gov/ncezid/dfwed/PDFs/SalmonellaAnnualTable2009.pdf* and that is also antibiotic resistant.

Response: FSIS is considering a petition for rulemaking submitted by the Center for Science in the Public Interest (CSPI) requesting that the Agency issue an interpretive rule declaring certain antibiotic-resistant strains of *Salmonella* to be adulterants when found in ground meat and ground poultry.[7] FSIS will address the issues raised by these commenters when we respond to the CSPI petition.

Comment: A consumer advocacy organization said that the Agency should declare as adulterated any raw product with the same pulsed field gel electrophoresis (PFGE) pattern as the *Salmonella* serotype associated with an illness outbreak, even if the product was produced in an establishment that has no relationship to the product involved in an illness outbreak. Conversely, an industry advocacy organization remarked that deeming certain strains of *Salmonella* adulterated when linked to an illness would penalize establishments for events beyond their control.

Response: As is explained in the December 2012 **Federal Register** notice, FSIS would likely not consider product of the same type adulterated though it is found to have the pathogen associated with the illness outbreak if the product were produced in other establishments that have no relationship to product involved in the illness outbreak (77 FR 72686, at 72689). A determination of adulteration would be specific to the product linked to the illness outbreak, to the conditions in the establishment where that product was produced, and possibly to product in other establishments when there is a relationship to the product involved in the outbreak.

Exporting NRTE Comminuted Poultry Products

Comment: Several comments questioned the Agency's sampling eligibility policies for exported NRTE products outlined in FSIS Notice 23–13.[8] A foreign consulting firm and several domestic processors and trade associations argued that NRTE comminuted poultry product being exported for further processing into RTE product should be treated the same way as NRTE comminuted poultry product destined for processing into RTE product within official establishments in the United States. Therefore, these commenters stated, the product destined for export should be exempt from FSIS sampling and testing. Multiple trade associations asserted that the ability to export NRTE comminuted poultry should be based on the requirements of the importing country, not domestic requirements.

Response: FSIS stated in the **Federal Register** (73 FR 4767; Jan. 28, 2008) that it will exclude from the *Salmonella* verification testing program any establishment that diverts all of its raw products to another official, federally inspected establishment for further processing into a RTE product. The instructions provided to inspection personnel in FSIS Notice 23–13 are consistent with what we announced in the January 2008 **Federal Register**.

If an establishment sends NRTE mechanically separated poultry product to export, FSIS cannot verify that all of the product exported will be processed into RTE product. Thus, if the product to be exported is in a class of product that FSIS samples and tests for *Salmonella* and *Campylobacter,* that product would be subject to FSIS verification sampling. In any case, even if the product is subject to FSIS *Salmonella* and *Campylobacter* testing, products otherwise eligible for export could still be exported. Such product needs to be produced under good

[7] Available at *http://www.fsis.usda.gov/wps/wcm/connect/04cb5fad-c13e-4de7-b391-2acd95191a95/Petition_CSPI_052511.pdf?MOD=AJPERES.*

[8] Available at *http://www.fsis.usda.gov/wps/wcm/connect/d27b07b5-f3e0-4ae1-8aff-9390c57ce132/23-13_422.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=d27b07b5-f3e0-4ae1-8aff-9390c57ce132.*

manufacturing practices (GMPs) to ensure wholesomeness of the product. GMPs would include process controls to ensure pathogen reduction at least on the source materials, and on-going verification testing to demonstrate that the product is maintained in a wholesome manner. As is discussed above, FSIS is providing test results to industry on the distribution of contamination in this type of product. Establishments desiring to export such NRTE product should strive to consistently produce product with a pathogen positive rate below the industry average and the FSIS standard, if one exists.

If a foreign country notifies FSIS that it will accept raw product from the United States that is normally subject to *Salmonella* and *Campylobacter* sampling and testing, but only if the product is labeled "for cooking only" or with another statement that indicates that product is to be handled a certain way in that country, FSIS would include that new labeling requirement in the export library. FSIS would need to approve the special claims on the labeling. In addition, inspectors would need to verify that the product meets the requirements in the export library, and that the product is going to a country that accepts the product as long as it bears the required labeling. If inspectors can verify these facts, FSIS likely would not sample and test the product for *Salmonella* and *Campylobacter*. However, if there is evidence that the establishment does not have adequate on-going controls to demonstrate that the product is maintained in a wholesome manner, FSIS may conduct intensified verification activities at this establishment, including testing and inspection procedures such as verification that the establishment maintains adequate sanitary dressing procedures, and that the establishment is effectively addressing pathogens. If FSIS is unable to verify that the establishment is addressing microbial contamination, FSIS may not certify the product for export.

Economic Impact of the Notice

Comment: One comment asserted that FSIS failed to address the negative economic impact of the 2012 **Federal Register** notice on the domestic poultry industry. An industry advocacy association estimated that it will cost some turkey producers close to $100,000 to transition to the 325-gram analytic sample size.

Response: As is explained above, FSIS's regulations require reassessment of HACCP plans when changes occur that could affect the HACCP plan or hazard analysis. Therefore, any costs associated with reassessment would not be "new" costs. Similarly, FSIS did not impose any new sampling requirements on establishments. If establishments choose to analyze their products for *Salmonella* or *Campylobacter,* they are not required to use the same sample analysis procedures as FSIS. The regulations require the establishment to maintain documents that support its verification activities and their frequency as appropriate for their intended purpose (9 CFR 417.5(a)(3)).

Comment: Several trade associations asserted that the changes announced in the notice will negatively affect exporters of NRTE mechanically separated poultry products [9] because they will be unable to obtain export certificates for the products.

Response: FSIS finds no evidence that the notice will jeopardize the ability of exporters to obtain export certificates. Establishments can continue to export comminuted product even if it subject to FSIS testing.

Salmonella Control Strategies for Industry

Comment: Several trade associations requested that FSIS provide small and very small establishments with specific guidance that will assist them in reassessing their HACCP plans for NRTE comminuted poultry and meat products.

Response: Guidance on how establishments can meet FSIS expectations (including pre-harvest and post-harvest suggestions) for the control of *Salmonella* and *Campylobacter* in poultry can be found in the Compliance Guideline for Controlling *Salmonella* and *Campylobacter* in Poultry, Third Edition, May 2010.[10]

In addition, Attachment 1 [11] to FSIS Notice 17–13 [12] details lessons learned regarding establishment sanitation, intervention use, and cooking instructions validation associated with two outbreaks involving NRTE comminuted poultry products. FSIS also sent Historical *Salmonella* Serotype Information (HSSI) letters to establishments that produce raw comminuted chicken or turkey products and that have had ground poultry samples collected between January 2005 and January 2012. Together with any existing *Salmonella* End of Set Letters (EOSL), the HSSI letters and associated spreadsheets provide each establishment with compiled serotype information on all available positive FSIS *Salmonella* results.

FSIS provided the information in the Attachment and in the HSSI letters because FSIS anticipated that establishments producing NRTE comminuted poultry products would find the information useful when they reassessed their HACCP plans for these products.

Comment: Multiple comments stated that FSIS failed to include in the December 2012 notice information on meaningful anti-*Salmonella* interventions or other factors that affect *Salmonella* control. Specifically, an industry advocacy organization stated that it is not practical to test for pathogens in incoming flocks, that pre-harvest information provides little useful information to set interventions, and that focusing on serotype-specific interventions is an ineffective approach to food safety. A member of academia said that insufficient attention is being paid to the practices of poultry growing operations.

Response: Establishments are in the best position to assess intervention use, including antimicrobial treatments, based on their knowledge of their own processes. However, as FSIS explained in the 2012 **Federal Register** notice, establishments should ensure that their slaughter and dressing procedures are designed to prevent contamination to the maximum extent possible (77 FR 72686, at 72688). These procedures should, at a minimum, be designed to limit the exterior contamination of birds before exsanguination, as well as to minimize digestive tract content spillage during the dressing process. In addition, the Compliance Guideline for Controlling *Salmonella* and *Campylobacter* in Poultry and Attachment 1 of FSIS Notice 17–13 provide guidance on the multiple-hurdle approach to reducing pathogens.

Establishments should identify the critical operating parameters of their antimicrobial interventions, as prescribed in their scientific support, and ensure that they are meeting these parameters effectively. FSIS found that the establishments associated with the outbreaks described in the December 2012 **Federal Register** notice were not consistently identifying the appropriate critical operating parameters of their antimicrobial interventions or

[9] Dr. Paul Aho, *Economic Impact of the Loss of the Export Market for Mechanically Separated Poultry Meat* (February 2013).

[10] Available at *http://www.fsis.usda.gov/PDF/Compliance_Guide_Controling_Salmonella_Campylobacter_Poultry_0510.pdf.*

[11] Available at *http://www.fsis.usda.gov/wps/wcm/connect/91c2976b-8eb4-4a7f-8390-9f7889f24709/NRTE-Comminuted-Turkey-Prod-Outbreaks.pdf?MOD=AJPERES.*

[12] Available at *http://www.fsis.usda.gov/wps/wcm/connect/f1e5822e-dd07-49d1-8bf7-ecd8d345c09a/17-13 412.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f1e5822e-dd07-49d1-8bf7-ecd8d345c09a.*

consistently applying these interventions effectively against pathogens of concern. Inappropriate application of antimicrobial interventions can result in establishments not being able to reduce pathogens to acceptable levels.

FSIS considers serotype information to be useful because establishments may consider measures to control serotypes of human health concern as well as measures to control all *Salmonella*. FSIS provides serotype information to assist establishments in identifying pathogen trends that may indicate one or more specific sources of *Salmonella* that establishments can address. Interventions may include serotype-specific interventions or controls that generally impact *Salmonella* in poultry.

Finally, FSIS encourages establishments, in considering food safety hazards that can occur before, during, and after entry into establishments, to consider pre-harvest factors that influence pathogens on incoming birds. The Compliance Guideline for Controlling *Salmonella* and *Campylobacter* in Poultry [13] includes pre-harvest information.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/federal-register*.

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/wps/portal/fsis/programs-and-services/email-subscription-service*. Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC on: April 15, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–08952 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–DM–P

[13] Available at *http://www.fsis.usda.gov/wps/wcm/connect/6732c082-af40-415e-9b57-90533ea4c252/Compliance_Guide_Controling_Salmonella_Campylobacter_Poultry_0510.pdf?MOD=AJPERES*.

DEPARTMENT OF AGRICULTURE

Forest Service

Wrangell-Petersburg Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Wrangell Petersburg Resource Advisory Committee (RAC) will meet in Wrangell, Alaska and Petersburg, Alaska. The committee is authorized under the Secure Rural Schools and Community Self Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. The meetings are open to the public. The purpose of the meetings is to review the progress of previously funded projects, review project proposals and make recommendations for allocation of Title II funds.

DATES: The meetings will be held at 8:00 a.m. on the following dates:

- May 9, 2014
- June 6, 2014
- July 19, 2014

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meetings will be held at the Wrangell Ranger District, 525 Bennett Street, Wrangell, Alaska; and at the Petersburg Ranger District, 12 North Nordic Drive, Petersburg, Alaska. Interested persons may attend in person at either location, or by telephone. A toll free teleconference number for those who wish to call in will be provided on request.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Petersburg Ranger District or the Wrangell Ranger District. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Jason Anderson, District Ranger, by phone at 907–772–3871 or by email at *jasonanderson@fs.fed.us;* or Robert Dalrymple, District Ranger, by phone at 907–874–2323 or by email at *rdalrymple@fs.fed.us*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed above.

SUPPLEMENTARY INFORMATION: Additional RAC information, including the meeting agenda and the meeting summary/minutes can be found at the following Web site: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/WrangellPetersburg?OpenDocument*. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing at least one week prior to the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Jason Anderson, District Ranger, Petersburg Ranger District, P.O.

Box 1328, Petersburg, Alaska 99833; or Robert Dalrymple, District Ranger, Wrangell Ranger District, P.O. Box 51, Wrangell, Alaska 99929; or by email to *jasonanderson@fs.fed.us,* or via facsimile to 907–772–5995.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: April 14, 2014.

Jason C. Anderson,

District Ranger.

[FR Doc. 2014–08994 Filed 4–18–14; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration (GIPSA)

Designation for the Owensboro, KY; Bloomington, IL; Iowa Falls, IA; Casa Grande, AZ; Fargo, ND; Grand Forks, ND; and Plainview, TX Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of J.W. Barton Grain Inspection Service, Inc. (Barton); Central Illinois Grain Inspection, Inc. (Central Illinois); Central Iowa Grain Inspection Corporation (Central Iowa); Farwell Commodity and Grain Services, Inc. (Farwell SW); North Dakota Grain Inspection Service, Inc. (North Dakota); Northern Plains Grain Inspection Service, Inc. (Northern Plains); and Plainview Grain Inspection and Weighing Service, Inc. (Plainview) to provide official services under the United States Grain Standards Act (USGSA), as amended.

DATES: April 1, 2014.

ADDRESSES: Eric J. Jabs, Chief, USDA, GIPSA, FGIS, QACD, QADB, 10383 North Ambassador Drive, Kansas City, MO 64153.

FOR FURTHER INFORMATION CONTACT: Eric J. Jabs, 816–659–8408 or *Eric.J.Jabs@usda.gov.*

Read Applications: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

SUPPLEMENTARY INFORMATION: In the July 22, 2013 **Federal Register** (78 FR 43850), GIPSA requested applications for designation to provide official services in the geographic areas presently serviced by Barton, Central Illinois, Central Iowa, Farwell SW., North Dakota, Northern Plains, and Plainview. Applications were due by August 21, 2013.

Barton, Central Illinois, Central Iowa, Farwell Southwest, North Dakota, Northern Plains, and Plainview were the sole applicants for designation to provide official services in these areas. As a result, GIPSA did not ask for additional comments.

GIPSA evaluated all available information regarding the designation criteria in section 79(f) of the USGSA (7 U.S.C. 79(f)) and determined that Barton, Central Iowa, North Dakota, Northern Plains, and Plainview are qualified to provide official services in the geographic area specified in the **Federal Register** on July 22, 2013. This designation action to provide official services in these specified areas is effective April 1, 2014 to March 31, 2017.

After completing an initial quality management review of Farwell SW., GIPSA determined that a follow-up review should be conducted. Accordingly, GIPSA is designating Farwell SW to provide services in this specified area for one year, effective April 1, 2014 to March 31, 2015. During this timeframe, such a review will be conducted.

GIPSA published a **Federal Register** Notice (79 FR 3172) on January 17, 2014 amending Central Illinois' designation to include the area previously designated to Decatur Grain Inspection, Inc. (Decatur), effective October 17, 2013 to March 31, 2014. In view of this, GIPSA is separately publishing an opportunity for designation in the **Federal Register** for the amended geographic area. Accordingly, GIPSA is designating Central Illinois to provide official services in that amended geographic area until a designee is selected and announced in the **Federal Register**. This period is not to exceed one year.

Interested persons may obtain official services by contacting these agencies at the following telephone numbers:

Official agency	Headquarters location and telephone	Designation start	Designation end
Barton	Owensboro, KY (270) 683–0616	4/1/2014	3/31/2017
Central Iowa	Iowa Falls, IA (641) 648–3467	4/1/2014	3/31/2017
Central Illinois	Bloomington, IL (309) 827–7121	4/1/2014	3/31/2015 or earlier [1]
Farwell SW	Casa Grande, AZ (520) 421–1027	4/1/2014	3/31/2015
North Dakota	Fargo, ND (701) 293–7420	4/1/2014	3/31/2017
Northern Plains	Grand Forks, ND (701) 772–2414	4/1/2014	3/31/2017
Plainview	Plainview, TX (806) 893–1364	4/1/2014	3/31/2017

Section 79(f) of the USGSA authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)).

Under section 79(g) of the USGSA, designations of official agencies are effective for no longer than three years unless terminated by the Secretary; however, designations may be renewed according to the criteria and procedures prescribed in section 79(f) of the USGSA.

[1] Illinois is being designated to provide official services in the amended geographic area until 3/31/2015 or until a designee is announced in the **Federal Register**, whichever is earlier.

Authority: 7 U.S.C. 71–87k.

Susan Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2014–08996 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Amended Opportunity for Designation in the Bloomington and Decatur, IL Areas; Request for Comments on the Official Agency Servicing This Area

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA), USDA.

ACTION: Notice.

SUMMARY: Central Illinois Grain Inspection, Inc. (Central Illinois) purchased Decatur Grain Inspection, Inc. (Decatur) and met the requirements specified in 7 CFR 800.196 (f)(2). A **Federal Register** Notice (79 FR 3172) was published to amend Central Illinois' designation to include the former Decatur geographic area and was effective October 17, 2013 to March 31, 2014. In view of this, GIPSA is providing an additional opportunity to apply for designation for Central Illinois' amended geographic area. GIPSA is designating Central Illinois to provide official services in the amended geographic area until a designee is selected and announced in the **Federal Register**. This period is not to exceed one year. We are asking persons or government agencies interested in providing official services in the areas presently served by this agency to submit an application for designation. In addition, we are providing an additional opportunity for comments on the quality of services provided by Central Illinois.

DATES: Applications and comments must be received by May 21, 2014.

ADDRESSES: Submit applications and comments concerning this notice using any of the following methods:

- *Applying for Designation on the Internet:* Use FGISOnline (*https://fgis.gipsa.usda.gov/default_home_FGIS.aspx*) and then click on the Delegations/Designations and Export Registrations (DDR) link. You will need to obtain an FGISOnline customer number and USDA eAuthentication username and password prior to applying.
- *Submit Comments Using the Internet:* Go to Regulations.gov (*http://www.regulations.gov*). Instructions for submitting and reading comments are detailed on the site.
- *Mail, Courier or Hand Delivery:* Eric J. Jabs, Acting Director, USDA, GIPSA, FGIS, QACD, 10383 North Ambassador Drive, Kansas City, MO 64153.
- *Fax:* Eric J. Jabs, 816–872–1257.
- *Email: Eric.J.Jabs@usda.gov.*

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

FOR FURTHER INFORMATION CONTACT: Eric J. Jabs, 816–659–8408 or *Eric.J.Jabs@usda.gov.*

SUPPLEMENTARY INFORMATION: Section 79(f) of the United States Grain Standards Act (USGSA) authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)). Under section 79(g) of the USGSA, designations of official agencies are effective for three years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 79(f) of the USGSA.

Areas Open for Designation

Central Illinois

Pursuant to Section 79(f)(2) of the United States Grain Standards Act, the following geographic area, in the State of Illinois, is assigned to this official agency. *In Illinois*

Bounded on the North by State Route 18 east to U.S. Route 51; U.S. Route 51 south to State Route 17; State Route 17 east to Livingston County; and the Livingston County line east to State Route 47;

Bounded on the East by State Route 47 south to State Route 116; State Route 116 west to Pontiac, which intersects with a straight line running north and south through Arrowsmith to the southern McLean County line; the southern McLean County line east to the eastern DeWitt County line; the eastern DeWitt County Line; the eastern Macon County line south to Interstate 72; Interstate 72 northeast to the eastern Piatt County line; the eastern Piatt, Moultrie, and Shelby County lines;

Bounded on the South by the southern Shelby County line; and a straight line running along the southern Montgomery County line west to State Route 16 to a point approximately one mile northeast of Irving;

Bounded on the West by a straight line from this point northeast to Stonington on State Route 48; a straight line from Stonington northwest to Elkhart on Interstate 55; a straight line from Elkhart northeast to the west side of Beason on State Route 10; State Route 10 west to the Logan County line; the western Logan County line; the southern Tazewell County line; the western Tazewell County line; the western Peoria County line north to Interstate 74; Interstate 74 southeast to State Route 116; State Route 116 north to State Route 26; and State Route 26 north to State Route 18.

The following grain elevators are not part of this geographic area assignment and are assigned to: Champaign-Danville Grain Inspection Departments, Inc.: East Lincoln Farmers Grain Co., Lincoln, Logan County, Illinois; Okaw Cooperative, Cadwell, Moultrie County; ADM (3 elevators), Farmer City, Dewitt County; and Topflight Grain Company, Monticello, Piatt County, Illinois.

Opportunity for Designation

Interested persons or government agencies may apply for designation to provide official services in the geographic areas specified above under the provisions of section 79(f) of the USGSA and 7 CFR 800.196. Designation in the specified geographic area is for a period ending March 31, 2017. To apply for designation or for more information, contact Eric J. Jabs at the address listed above or visit GIPSA's Web site at *http://www.gipsa.usda.gov.*

Request for Comments

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the Central Illinois official agency. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicants. Submit all comments to Eric J. Jabs at the above address or at *http://www.regulations.gov.*

We consider applications, comments, and other available information when determining which applicants will be designated.

Authority: 7 U.S.C. 71–87k.

Susan Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2014–08999 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Seek Approval To Reinstate an Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this

notice announces the intention of the National Agricultural Statistics Service (NASS) to seek reinstatement of an information collection, the 2014 Tenure, Ownership and Transition of Agricultural Land (TOTAL) survey, formerly known as the Agricultural Economics and Land Ownership Survey (AELOS).

DATES: Comments on this notice must be received by June 20, 2014 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0240, 2014 TOTAL, by any of the following methods:

- *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333. Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

SUPPLEMENTARY INFORMATION: *Title:* 2014 TOTAL.

OMB Control Number: 0535–0240.

Type of Request: Intent to Seek Reinstatement of an Information Collection.

Abstract: The National Agricultural Statistics Service (NASS) of the United States Department of Agriculture (USDA) will request approval from the Office of Management and Budget (OMB) for the 2014 Tenure, Ownership and Transition of Agricultural Land (TOTAL) surveys to be conducted as follow-on surveys to the 2012 Census of Agriculture and are authorized by the Food, Conservation, and Energy Act of 2008 as amended.

The 2014 TOTAL surveys will be conducted in 2015, referencing the calendar year of 2014. In 2015 the Agricultural Resource Management Survey (ARMS) Phase III (OMB # 0535 0218) will be suspended for a period of 1 year. The scope of the TOTAL survey is greater than that of the ARMS III survey. To maintain the ARMS III data series, data will be gleaned from the TOTAL surveys to replace the 2014 ARMS collection.

The TOTAL survey will be conducted in two phases. The first phase will be the creation of a list of land owners who rent out land for agricultural purposes. These landlords will be excluded from the sample if they are also active farm or ranch operators as these entities are part of the phase II version 1 sampling population discussed below. The area segments that are used during our June Area Survey (OMB # 0535–0213) will be used as the target areas. We will compare the land inside these segments with land ownership data from the Farm Services Agency (FSA) along with property tax information purchased from CoreLogic (a privately owned company). After the removal of any duplication within this list we will have our target sample for the Landlord only version of the survey which will be conducted in Phase 2. The current NASS List Frame of known farmers and ranchers will be used to create the sample for the Operator version of the survey. No list building will be conducted in Phase 1 for the operator questionnaire.

The second phase of the survey will include data collection and reporting using two versions of the TOTAL questionnaires. Version 1 of the TOTAL survey will target farm and ranch operators in the 48 contiguous States. The sample will be drawn from a list of all known farming operations that sold at least $1,000 in agricultural products in 2014. The stratified sample will be representative of the farm operator population. The sample will be large enough to publish State level data for the 25 largest agricultural producing States based on value of sales. These 25 core States account for an average rate of 85.5% of the total value of agricultural products produced in the three year period of 2010–2012. Version 2 of the TOTAL survey will target individuals who own and rent out farm land. Individuals who are both farm operators and landlords will be excluded from the Version 2 sample since they are included in the Version 1 sample population. The Version 2 population should be large enough to publish State level data for the 25 core States. The remaining 23 States that will be included in the survey will have their data combined in the all other States category, so that US level estimates can be published.

Data collection for both Versions should begin around January 1, 2015, using 2014 as the reference period. A final report is targeted to be published in August 2015.

Authority: The Tenure, Ownership and Transition of Agricultural Land (TOTAL) surveys are required by law under the "Census of Agriculture Act of 1997," Pub. L. 105–113, 7 U.S.C. 2204(g) as amended. These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3501, et seq.) and Office of Management and Budget regulations at 5 CFR part 1320.

NASS also complies with OMB Implementation Guidance, "Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA)," **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33362. The law guarantees farm operators that their individual information will be kept confidential. NASS uses the information only for statistical purposes and publishes only tabulated total data. These data are used by Congress when developing, updating, or changing farm programs. These data will also be used to produce estimates of sector-wide production expenditures and other components of income that are used in constructing the estimates of income and value-added which are transmitted to the U.S. Department of Commerce, Bureau of Economic Analysis, by the USDA Economic Research Service (ERS) for use in constructing economy-wide estimates of Gross Domestic Product. The data will also be used to construct demographic data on the owners and operators of farm land in the United States and their potential transition strategies.

Many national and state programs are designed or allocated based on these data. Farm operators, landlords, and financial institutions rely on these data to make informed business decisions when selling or renting land, applying for business loans, or making decisions on expanding or diversifying their operations.

Estimate of Burden: Public reporting burden for Version 1 (farm operators) is estimated to average 90 minutes per response. Public reporting burden for Version 2 (landlords only) is estimated to average 60 minutes per response. Multiple data collection modes will be incorporated to help minimize data collection costs. The questionnaires will be available on the internet to the targeted sample. NASS will mail the

questionnaires to the respondents at least twice and may use autodial or a postcard reminder, before attempting phone or personal interviews to collect the data.

Respondents: Version 1—farm operators: Version 2 landlords who rent out farm land but do not operate farms.

Estimated Number of Respondents: 45,000 farm or ranch operators and 45,000 landlords who do not operate farms or ranches.

Estimated Total Annual Burden on Respondents: 132,000 hours. In order to minimize data collection costs, NASS will attempt to collect data by utilizing an internet version of the questionnaire as well as the U.S. Postal Service. NASS will then attempt to collect the data from non-respondents by either phone or personal enumeration. With the initial mailing, respondents will be provided with instructions on how to access the internet and complete the questionnaire on line.

The primary objectives of the National Agricultural Statistics Service are to prepare and issue State and national estimates of crop production, livestock production, economic statistics, and environmental statistics related to agriculture and to conduct the Census of Agriculture and it's follow on surveys, which includes the TOTAL surveys.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, April 10, 2014.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2014-09007 Filed 4-18-14; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Notice of Request for Applications for the Veterinary Medicine Loan Repayment Program

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is announcing the release of the Veterinary Medicine Loan Repayment Program (VMLRP) Request for Applications (RFA) at *www.nifa.usda.gov/vmlrp.*

DATES: The fiscal year (FY) 2014 Veterinary Medicine Loan Repayment Program (VMLRP) application package will be available at *www.nifa.usda.gov/vmlrp* on Monday, April 21, 2014 and applications are due by Friday, June 6, 2014.

FOR FURTHER INFORMATION CONTACT: Gary Sherman; National Program Leader, Veterinary Science; National Institute of Food and Agriculture; U.S. Department of Agriculture; STOP 2240, 1400 Independence Avenue SW., Washington, DC 20250–2240; Voice: 202–401–4952; Fax: 202–401–6156; Email: *gsherman@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background and Purpose

In January 2003, the National Veterinary Medical Service Act (NVMSA) was passed into law adding section 1415A to the National Agricultural Research, Extension, and Teaching Policy Act of 1997 (NARETPA). This law established a new Veterinary Medicine Loan Repayment Program (7 U.S.C. 3151a) authorizing the Secretary of Agriculture to carry out a program of entering into agreements with veterinarians under which they agree to provide veterinary services in veterinarian shortage situations.

On January 17, 2014, the President signed into law the Consolidated Appropriations Act, 2014 (Pub. L. 113–76), which appropriated $4,790,000 for the VMLRP.

Section 7105 of FCEA amended section 1415A to revise the determination of veterinarian shortage situations to consider (1) geographical areas that the Secretary determines have a shortage of veterinarians; and (2) areas of veterinary practice that the Secretary determines have a shortage of veterinarians, such as food animal medicine, public health, epidemiology, and food safety. This section also added that priority should be given to agreements with veterinarians for the practice of food animal medicine in veterinarian shortage situations.

NARETPA section 1415A requires the Secretary, when determining the amount of repayment for a year of service by a veterinarian to consider the ability of USDA to maximize the number of agreements from the amounts appropriated and to provide an incentive to serve in veterinary service shortage areas with the greatest need. This section also provides that loan repayments may consist of payments of the principal and interest on government and commercial loans received by the individual for the attendance of the individual at an accredited college of veterinary medicine resulting in a degree of Doctor of Veterinary Medicine or the equivalent. This program is not authorized to provide repayments for any government or commercial loans incurred during the pursuit of another degree, such as an associate or bachelor degree. Loans eligible for repayment include educational loans made for one or more of the following: Loans for tuition expenses; other reasonable educational expenses, including fees, books, and laboratory expenses, incurred by the individual; and reasonable living expenses as determined by the Secretary. In addition, the Secretary is directed to make such additional payments to participants as the Secretary determines appropriate for the purpose of providing reimbursements to participants for individual tax liability resulting from participation in this program. Finally, this section requires USDA to promulgate regulations within 270 days of the enactment of FCEA (*i.e.*, June 18, 2008). The Secretary delegated the authority to carry out this program to NIFA.

The final rule was published in the **Federal Register** on April 19, 2010 (75 FR 20239–20248). Based on comments received during the 60-day comment period upon publication of the interim rule on July 9, 2009 (74 FR 32788–32798), NIFA reconsidered the policy regarding individuals who consolidated their veterinary school loans with other educational loans (e.g. undergraduate) and their eligibility to apply for the VMLRP. NIFA will allow these individuals to apply for and receive a VMLRP award; however, only the eligible portion of the consolidation will be repaid by the VMLRP. Furthermore, applicants with consolidated loans will be asked to provide a complete history of their student loans from the National Student Loan Database System (NSLDS), a central database for student aid

operated by the U.S. Department of Education. The NSLDS Web site can be found at *www.nslds.ed.gov*. Individuals who consolidated their DVM loans with non-educational loans or loans belonging to an individual other than the applicant, such as a spouse or child, will continue to be ineligible for the VMLRP.

In FY 2010, NIFA announced its first funding opportunity for the VMLRP and in the four program cycles since, NIFA has received 695 applications from which 240 VMLRP awards totaling $20,723,720 were issued. Consequently, up to $4,500,000 is available to support this program in FY 2014. Funding for future years will be based on annual appropriations and balances, if any, remaining from prior years. The eligibility criteria for applicants and the application forms and associated instructions needed to apply for a VMLRP award can be viewed and downloaded from the VMLRP Web site at *http://www.nifa.usda.gov/vmlrp*.

Done in Washington, DC, this 10th day of April, 2014.

Sonny Ramaswamy,

Director, National Institute of Food and Agriculture.

[FR Doc. 2014-08938 Filed 4-18-14; 8:45 am]

BILLING CODE 3410-22-P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS-2014-0002]

Notice of Proposed Changes to the National Handbook of Conservation Practices for the Natural Resources Conservation Service

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Notice of availability of proposed changes in the NRCS National Handbook of Conservation Practices for public review and comment.

SUMMARY: Notice is hereby given of the intention of NRCS to issue a series of revised conservation practice standards in the National Handbook of Conservation Practices. These standards include: Access Road (Code 560), Agrichemical Handling Facility (Code 309), Grade Stabilization Structure (Code 410), Precision Land Forming (Code 462), Short Term Storage of Animal Waste and Byproducts (Code 318), Terraces (Code 600), Trails and Walkways (Code 575), Watering Facility (Code 614) and Water Well (Code 642).

NRCS State Conservationists who choose to adopt these practices for use within their States will incorporate them into section IV of their respective electronic Field Office Technical Guide. These practices may be used in conservation systems that treat highly erodible land (HEL) or on land determined to be a wetland. Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 requires NRCS to make available for public review and comment all proposed revisions to conservation practice standards used to carry out HEL and wetland provisions of the law.

DATES: *Effective Date:* This is effective April 21, 2014.

Comment Date: Submit comments on or before May 21, 2014. Final versions of these new or revised conservation practice standards will be adopted after the close of the 30-day period and after consideration of all comments.

ADDRESSES: Comments should be submitted, identified by Docket Number NRCS–2014–0002, using any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail or hand-delivery: Public Comments Processing, Attention: Regulatory and Agency Policy Team, Strategic Planning and Accountability, Natural Resources Conservation Service, 5601 Sunnyside Avenue, Building 1-1112D, Beltsville, Maryland 20705.

NRCS will post all comments on *http://www.regulations.gov*. In general, personal information provided with comments will be posted. If your comment includes your address, phone number, email, or other personal identifying information, your comments, including personal information, may be available to the public. You may ask in your comment that your personal identifying information be withheld from public view, but this cannot be guaranteed.

FOR FURTHER INFORMATION CONTACT: Wayne Bogovich, National Agricultural Engineer, Conservation Engineering Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue SW., Room 6136 South Building, Washington, DC 20250.

Electronic copies of the proposed revised standards are available through *http://www.regulations.gov* by accessing Docket No. NRCS–2014–0002. Alternatively, copies can be downloaded or printed from the following Web site: *http://go.usa.gov/TXye*. Requests for paper versions or inquiries may be directed to Emil Horvath, National Practice Standards Review Coordinator, Natural Resources Conservation Service, Central National Technology Support Center, 501 West Felix Street, Fort Worth, Texas 76115.

SUPPLEMENTARY INFORMATION: The amount of the proposed changes varies considerably for each of the conservation practice standards addressed in this notice. To fully understand the proposed changes, individuals are encouraged to compare these changes with each standard's current version as shown at: *http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/?cid=nrcs143026849*. To aid in this comparison, following are highlights of some of the proposed revisions to each standard:

Access Road (Code 560)—The agency revised the definition. The chart for the location of cross slope drainage features was modified to include a variety of soils rather than a single soil.

Agrichemical Handling Facility (Code 309)—The agency added new criteria under which lowering the water table would be allowable, expanded sizing criteria of the agrichemical handling pad, clarified language under the storage capacity criteria, added new criteria for an equipment wash bay, and updated and added clarification to the criteria for concrete exposed to agrichemicals.

Grade Stabilization Structure (Code 410)—The agency refined the definition, modified criteria, and updated terminology related to hazard classification.

Precision Land Forming (Code 462)—The agency updated the operation and maintenance section and references.

Short Term Storage of Animal Waste and Byproducts (Code 318)—The agency created this new conservation practice standard.

Terraces (Code 600)—The agency clearly defined pressure flow and gravity flow, added tractive stress references, updated the operation and maintenance section, and added references.

Trails and Walkways (Code 575)—The agency incorporated *Trails and Walkways (Code 568)* into *Animal Trails and Walkways (Code 575)* under the name *Trails and Walkways (Code 575)*. These standards were combined into one because many of the criteria are very similar. The practice name, definition, purpose, and conditions where practice applies were modified accordingly.

Watering Facility (Code 614)—The agency revised the definition of this practice and a purpose was added. The criteria for watering ramps were added. There is more emphasis on water storage tanks.

Water Well (Code 642)—The agency changed the criteria to clarify that domestic use and irrigation wells must follow consensus standards, grouting, and sealing with a water tight seal required in annulus of the casing, clarified suitable filter pack materials, removed numerical limit on intake velocity through screens, added statement to emphasize all wells must be developed, and added that well performance testing must be conducted after completion.

Signed this 9th day of April, 2014, in Washington, DC.

Jason A. Weller,

Chief, Natural Resources Conservation Service.

[FR Doc. 2014–08936 Filed 4–18–14; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

2014 Farm Bill Implementation Listening Session—Value-Added Producer Grant Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: As part of our implementation of the Agricultural Act of 2014 (commonly referred to as the 2014 Farm Bill), the Rural Business Cooperative Service (RBS) is hosting a listening session for initial public input about changes to Value Added Producer Grant (VAPG) program for which RBS has been delegated the authority to implement. The 2014 Farm Bill specifically identifies two new provisions to be implemented for VAPG: (1) an additional priority preference for veteran farmers or ranchers and (2) a priority for projects that best contribute to creating or increasing marketing opportunities for beginning farmers or ranchers, socially disadvantaged farmers or ranchers, operators of small and medium-sized family farms and ranches that are structured as family farms, and/or veteran farmers or ranchers.

RBS is holding this listening session specifically to provide an opportunity for stakeholders to voice their priorities, concerns, and requests on the "best contributing" priority. Instructions regarding registering for and attending the listening session are in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES:

Listening session: The listening session will be on April 25, 2014, and will begin at 1:00 p.m. and is scheduled to end by 4:00 p.m.

Registration: You must register by 5pm ET on April 23, 2014, to attend the listening session and to provide oral comments during the listening session.

Comments: Written comments are due by 5pm ET on April 24, 2014.

ADDRESSES: We invite you to participate in the listening session. The listening session is open to the public. The meeting will be held in the Room 107–A of the Whitten Building at 14th Street and Independence Ave. SW., Washington, DC 20250.

We also invite you to submit comments by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments; or
- Orally at the listening session; please also provide a written copy of your comments online as specified above or in hard copy at the listening session.

FOR FURTHER INFORMATION CONTACT: Andrew Jermolowicz; phone: (202) 720–8460. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION: On February 7, 2014, the 2014 Farm Bill (Pub. L. 113–79) was signed into law. The Secretary of Agriculture and the respective USDA agencies, including RBS, are working to implement the provisions of the 2014 Farm Bill as expeditiously as possible to meet the needs of producers and other stakeholders. In order to implement the provisions expeditiously and to ensure transparency, it is important to hear from stakeholders to be aware of their priorities, concerns, or requests.

RBS will hold the listening session on April 25, 2014, to receive oral comments from stakeholders and the public. A written copy of the oral comments is requested. (See the **ADDRESSES** section above for information about submitting written comments.) In addition, stakeholders and the public who do not wish to attend or speak at the listening session are invited to submit written comments, which must be received by 5pm ET April 24, 2014.

As a listening session, the focus is for RBS to hear from the public; this is not a discussion with RBS officials or a question and answer session. As noted above, the purpose is to receive public input that RBS can factor into decisions it needs to make in order to implement the "best contributing" priority of the 2014 Farm Bill for the VAPG program (as outlined as priority #2 of this announcement summary above) .

Date: April 25, 2014

Time: 1:00 p.m.–4:00 p.m.

Location information: USDA headquarters, in the Whitten Building, Room 107–A, 14th Street and Independence Ave. SW., Washington, DC 20250.

The listening session will begin with brief opening remarks from the USDA leadership in Rural Development. Individual speakers providing oral comments are requested to be succinct as we do not know at this time how many participants there will be. As noted above, we request that speakers providing oral comments also provide a written copy of their comments. (See the **ADDRESSES** section above for information about submitting written comments.) All stakeholders and interested members of the public are welcome to register to provide oral comments; however, due to the time constraints a limited number will be selected on a first come, first serve basis.

The purpose of the listening session is for RBS to hear from stakeholders and other interested members of the public about the "best contributing" priority as required by the 2014 Farm Bill. Please refer to the VAPG program in your comment. In your comments, provide your input about how this provision could be implemented, including your rationale, for us to consider.

Instructions for Attending the Meeting

Space for attendance at the meeting is limited. Due to USDA headquarters security and space requirements, all persons wishing to attend the public meeting or provide oral comments to RBS during the listening session must send an email to *Andrew.jermolowicz@wdc.usda.gov* by 5 p.m. on April 23, 2014, to register the names of those planning to attend. Registrations will be accepted until maximum room capacity is reached. To register, provide the following information:

- First Name
- Last Name
- Organization
- Title
- Email
- City
- State

Upon arrival at the USDA Whitten Building, registered persons must provide valid photo identification in order to enter the building; visitors need to enter the Whitten Building on the mall side. Please allow extra time to get through security. Additional

information about the listening session, agenda, directions to get to the listening session, and how to provide comments is available at the USDA Farm Bill Web site *http://www.usda.gov/wps/portal/usda/usdahome?navid=farmbill.*

All written comments received will be publicly available on *www.regulations.gov.* If you require special accommodations, such as a sign language interpreter, use the contact information above. The listening session location is accessible to persons with disabilities.

Dated: April 16, 2014.

Ashli Palmer,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. 2014-09059 Filed 4-18-14; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

[Docket No. 131202999-4294-02]

Privacy Act System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice; COMMERCE/CENSUS-5, Decennial Census Program.

SUMMARY: The Department of Commerce (Commerce) publishes this notice to announce the effective date of a Privacy Act System of Records notice entitled COMMERCE/CENSUS-5, Decennial Census Program.

DATES: The system of records becomes effective on April 21, 2014.

ADDRESSES: For a copy of the system of records please mail requests to Byron Crenshaw, Policy Coordination Office, Room HQ-8H021, U.S. Census Bureau, Washington, DC 20233-3700.

FOR FURTHER INFORMATION CONTACT: Byron Crenshaw, Policy Coordination Office, Room HQ-8H021, U.S. Census Bureau, Washington, DC 20233-3700, 301-763-6440.

SUPPLEMENTARY INFORMATION: On March 24, 2014, Commerce published and requested comments on a proposed amended Privacy Act System of Records notice entitled COMMERCE/CENSUS-5, Decennial Census Program (79 FR 10090). In that notice the Department announced its intent to amend the system of records to update the categories of individuals and records; the authorities for maintenance of the system of records; the system manager and address; the policies and practices for storage, retention, disposal, and safeguarding the system of records; and records source categories. This amendment also made other minor updates. No comments were received in response to the request for comments. By this notice, the Department is adopting the proposed amended system as final without changes effective April 21, 2014

Dated: April 15, 2014.

Brenda Dolan,

U.S. Department of Commerce, Freedom of Information and Privacy Act Officer.

[FR Doc. 2014-08993 Filed 4-18-14; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2014-2016 Company Organization Survey

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written comments must be submitted on or before June 20, 2014.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Joy P. Pierson, Economic Planning and Coordination Division, U.S. Census Bureau, Room 8K319, Washington, DC 20233-6100 (or by email at *Joy.P.Pierson@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the annual Company Organization Survey (COS) to update and maintain a central, multipurpose Business Register (BR) database. In particular, the COS supplies critical information on the composition, organizational structure, and operating characteristics of multi-location companies.

The BR serves two fundamental purposes:

—First and most important, it provides sampling populations and enumeration lists for the Census Bureau's economic surveys and censuses, and it serves as an integral part of the statistical foundation underlying those programs. Essential for this purpose is the BR's ability to identify all known United States business establishments and their parent companies. Further, the BR must accurately record basic business attributes needed to control sampling and enumeration. These attributes include industrial and geographic classifications, and name and address information.

Second, it provides establishment data that serve as the basis for the annual County Business Patterns (CBP) statistical series. The CBP publications present data on a number of establishments, first quarter payroll, annual payroll, and mid March employment summarized by industry and employment size class for the United States, the District of Columbia, island areas, counties, and country-equivalents. No other annual or more frequent series of industry statistics provides comparable detail, particularly for small geographic areas.

II. Method of Collection

The 2014-2016 COS collection strategy will focus on launching electronic reporting as the primary collection option. As the Census Bureau moves to increase electronic response and process less paper, we plan to replace some form mailings with letters encouraging electronic response. The 2014-2016 COS will request company-level information from a selection of multi-establishment enterprises, which comprise roughly 42,000 parent companies and more than 1.4 million establishments. Additionally, the panel will include approximately 5,000 large single-location companies that may have added locations during the year. Electronic reporting will be available to all 2014-2016 COS respondents. Companies will receive and return responses by secure Internet transmission. Companies that cannot use the Internet may request a CD-ROM containing their electronic data or may request a paper questionnaire. COS content is identical for all of the reporting modes.

The instrument will include inquiries on ownership or control by domestic or foreign parent, ownership of foreign affiliates, and leased employment. Further, the instrument will list an inventory of establishments belonging to the company and its subsidiaries, and

request updates to these inventories, including additions, deletions, and changes to information on EIN, name and address, and industrial classification, end-of-year operating status, mid-March employment, first quarter payroll, and annual payroll.

Additionally, the Census Bureau will ask certain questions in the 2014–2016 COS in order to enhance content. We will include questions on ownership or control by domestic or foreign parents, ownership of foreign affiliates, research and development, leased employment, and manufacturing activities related to the Enterprise Statistics Program.

III. Data

OMB Control Number: 0607–0444.

Form Number(s): NC–99001 (for multi-establishment enterprises) and NC–99007 (for single location companies).

Type of Review: Regular submission.

Affected Public: Businesses and not for profit institutions.

Estimated Number of Respondents: 47,000 enterprises.

Estimated Time per Response: 3.16 hours.

Estimated Total Annual Burden Hours: 148,567.

Estimated Total Annual Cost to Public: $4,648,661.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. 182, 195, 224, and 225.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 16, 2014.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2014–09023 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 8, 2013, the Department of Commerce (the Department) published its preliminary results for the new shipper review (NSR) of the antidumping duty order on fresh garlic from the People's Republic of China (the PRC) covering the period of review (POR) of November 1, 2011, through October 31, 2012, for Shijiazhuang Goodman Trading Co., Ltd. (Goodman).[1] Based on our analysis of comments received subsequent to the *Preliminary Results*, the Department now finds that Goodman's sales were not *bona fide*. As a result, the Department is rescinding this NSR.

DATES: *Effective Date:* April 21, 2014.

FOR FURTHER INFORMATION CONTACT: Nicholas Czajkowski or Gene Calvert, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–1395 or (202) 482–3586, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 8, 2013, the Department published the *Preliminary Results*. Between January 13, 2014, and January 22, 2014, Petitioners[2] and Goodman each submitted case and rebuttal briefs. On January 29, 2014, the Department conducted a hearing regarding this NSR.[3] As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.[4] Therefore, all deadlines in this segment of the proceeding have been extended by 16 days. As a result, the revised deadline for the final results of this NSR is now April 3, 2014.

Scope of the Order

The products covered by the order are all grades of garlic, whole or separated into constituent cloves. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 0703.20.0000, 0703.20.0010, 0703.20.0015, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 0711.90.6500, 2005.90.9500, 2005.90.9700, and 2005.99.9700. A full description of the scope of the order is contained in the Issues and Decision Memorandum.[5] Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description is dispositive.

Final Rescission of New Shipper Review

Due to the totality of circumstances, including price, quantity, and concerns regarding the relationship with another garlic exporter located in the PRC, as detailed in the Goodman Final Analysis Memorandum, the Department finds that Goodman's sales are not *bona fide*.[6]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum, which is dated concurrently and is hereby adopted by this notice. A list of the issues raised in the briefs and addressed in the Issues and Decision Memorandum is appended to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's centralized electronic service system (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the

[1] *See Fresh Garlic From the People's Republic of China: Preliminary Results of New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.*, 78 FR 67112 (November 8, 2013) (*Preliminary Results*).

[2] Petitioners are the Fresh Garlic Producers Association and its individual members: Christopher Ranch LLC; The Garlic Company; Valley Garlic; and Vessey and Company, Inc. (collectively, Petitioners).

[3] *See* "Public Hearing In The Matter of: the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China," (January 29, 2014).

[4] *See* the Department Memorandum, "Deadlines Affected by the Shutdown of the Federal Government," (October 18, 2013).

[5] *See* the Department Memorandum, "Decision Memorandum for the Final Results in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Shijiazhuang Goodman Trading Co., Ltd.," (April 3, 2014) (Issues and Decision Memorandum).

[6] *See* Department Memorandum, "New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Analysis of Shijiazhuang Goodman Trading Co. Ltd.," (April 3, 2014) (Goodman Final Analysis Memorandum).

Department's Central Records Unit, Room 7064 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Cash Deposit Requirements

Effective upon publication of the final rescission of the NSR of Goodman, the Department will instruct CBP to discontinue the option of posting a bond or security in lieu of a cash deposit for entries of subject merchandise by Goodman. Cash deposits will be required for exports of subject merchandise by Goodman entered, or withdrawn from warehouse, for consumption on or after the publication date at the per-unit PRC-wide rate, $4.71 per kilogram.

Assessment Instructions

Both the PRC separate rate and the PRC entity are under review in the 2011–2012 administrative review, which is currently being conducted,[7] and the POR of the administrative review coincides with the POR of this NSR. Goodman has filed a separate rate application in the concurrent administrative review indicating that it is independent of Chinese government control. Therefore, we will issue liquidation instructions for Goodman's entries upon completion of the administrative review. In the final results of the administrative review, the Department will determine whether Goodman qualifies for the PRC separate rate or the PRC-wide rate. Upon completion of the administrative review, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries for Goodman at the appropriate rate.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary of Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

[7] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 77 FR 77017 (December 31, 2012).

Return of Destruction of Proprietary Information

This notice serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(2)(B) and 777(i) of the Act, and 19 CFR 351.214.

Dated: April 3, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Issues
Comment 1: Whether Goodman Qualifies for a New Shipper Rate
Comment 2: Whether Goodman's Sales are *Bona Fide*
Comment 3: Whether the Department Should Change the Surrogate Country from the Philippines to Thailand
Comment 4: Whether the Department Should Use the Month Corresponding to Goodman's Sales to Calculate Surrogate Values for Garlic
Comment 5: Whether the Department Should Rely on the Import Data Used in the Preliminary Results
Comment 6: Whether the Department Should Use Farm Gate Prices or Wholesale Prices
Comment 7: Whether the Department Should Continue to Rely on the Financial Statements Used in the Preliminary Results.
Comment 8: Whether the Department Should Use MERALCO's Tariff to Value Electricity
Comment 9: Whether the Department Should Include the Transportation Expense in the Overhead Ratio
Comment 10: Whether Goodman is Entitled to a Separate Rate in this Proceeding
Comment 11: Whether the PRC-Wide Entity Rate is Reliable and Relevant
V. Recommendation

[FR Doc. 2014–09015 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Marine Recreational Information Program, Hawaii Mail-in Survey for Shore Fishing Effort

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 20, 2014.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Hongguang Ma, (808)725–5663 or *Hongguang.Ma@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection.

Marine recreational anglers are surveyed to collect catch and effort data, fish biology data, and angler socioeconomic characteristics. These data are required to carry out provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as amended, regarding conservation and management of fishery resources.

Marine recreational fishing catch and effort data are collected through a combination of mail surveys, telephone surveys and on-site intercept surveys with recreational anglers. Amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) require the development of an improved data collection program for recreational fisheries. To meet these requirements, NOAA Fisheries has designed and tested new approaches for sampling and surveying recreational anglers.

A mail survey of all anglers within a household will be used to collect recent fishing effort data including gear and methods of fishing from shore. The main purpose will be to compare to on-site roving counts of shore fishing effort during the same period and to produce adjustment factors for under-coverage of the roving on-site survey (the roving effort survey does not require response from the public). The survey scope is Oahu, during a single 2-month sampling wave (current schedule July–Aug, 2014). The effort surveys will use catch data from the ongoing shore angler intercept survey to produce estimates of total catch, harvested catch, and live released catch.

II. Method of Collection

Information will be collected through mail surveys.

III. Data

OMB Control Number: 0648–XXXX.

Form Number: None.

Type of Review: Regular submission (request for a new information collection).

Affected Public: Non-profit institutions; State, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 900.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 300.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 16, 2014.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2014–09020 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD245

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold a meeting, which is open to the public.

DATES: The HMSMT will meet Wednesday, May 7, 2014, to Friday, May 9, 2014. The meeting will begin each day at 8:30 a.m. and continue until close of business on each day. The meeting is expected to adjourn by midday on May 9.

ADDRESSES:

Meeting Address: The meeting will be held in U.S. Fish and Wildlife Service, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008.

Council Address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The HMSMT plans to discuss the following topics:

1. Potential changes to management measures for the west coast drift gillnet fishery based on guidance from the Council at its March 2014 meeting. Topics covered include a long-term transition plan for the fishery, the use of alternative gear types, and establishing a Federal limited access permit program for the fishery.

2. Criteria for evaluating exempted fishing permits submitted to test alternative gear.

3. Council recommendations with respect to international management of HMS stocks of interest.

4. Potential changes to HMS management that may be implemented for the April 1, 2015–March 31, 2017 biennial period, which the Council will begin considering in June 2014. Specifically, recreational fishery bag limit changes for Pacific bluefin tuna.

5. Other informational items and related tasks such as preparation of the HMS SAFE document.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 16, 2014.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–09003 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD250

Western Pacific Fishery Management Council (WPFMC); Public Meeting/ Hearing

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting and hearing.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold a meeting of its American Samoa Regional Ecosystem Advisory Committee (REAC) to discuss fishery management issues in the Territory of American Samoa. Hearings to receive public input on the Council action to modify the boundaries of the American Samoa Large Pelagic Vessel Area closure (LPVA) will also be held.

DATES: A public hearing will be held at Sadies by the Sea Conference Room in Pago Pago on May 3, 2014. The

American Samoa REAC meeting will be held in American Samoa in the village of Tafuna on May 5, 2014. See **SUPPLEMENTARY INFORMATION** for specific dates, times, and locations.

ADDRESSES: Written comments on this issue may be sent to Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813. Comments may be sent to the Council via facsimile (fax) at (808) 522–8226.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, WPFMC, telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION:

Date, Time, and Location for Public Hearing and American Samoa REAC Meeting

- Pago Pago, American Samoa—Saturday, May 3, 2014, from 4 p.m. to 6 p.m., at the Sadies By The Sea Conference Room;
- Tafuna, American Samoa—Monday, May 5, 2014, from 9 a.m. to 1 p.m. at the Port Administration Airport Building, Tafuna International Airport, AS 96799;

4 to 6 p.m., May 3, 2014, Sadies by the Sea Conference Room

Modification to the Boundaries of the American Samoa Large Pelagic Vessel Area Closure.

At its 159th Meeting, the Western Pacific Regional Fishery Management Council directed staff to prepare an amendment to the Pelagics Fishery Ecosystem Plan to modify the LVPA and identify options to reduce, for a period of one year, the northern boundary of the LVPA around Tutuila, Manua, and Rose to 25 nautical miles and to reduce the LVPA around Swains to 12 nautical miles, as preliminarily preferred alternative. The purpose of this amendment is to provide a temporary increase in the area that can be fished by the large vessel segment of the American Samoa longline fleet such that competition between longline gears is reduced, albacore catch rates improved, and that there are reductions in the cost of longline trips, thus improving economic returns from the fishery. The need for this amendment is to promote the efficiency of the American Samoa longline fishery at a time when the fishery is experiencing difficulties in maintaining the economic viability of the fishery.

9 a.m. to 1 p.m., May 5, 2014, Port Administration Airport Building, Tafuna International Airport

1. Welcome and Introduction of Members
2. Report on Fishery Development Program
3. Report on Sanctuaries Program in American Samoa
4. Marine Conservation Plan
5. Modification to the Boundaries of the American Samoa Large Pelagic Vessel Area closure
6. Public Hearing
7. REAC Discussion and Recommendations

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 15, 2014.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–08954 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD242

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Trawl Groundfish Electronic Monitoring Technical Advisory Committee and Groundfish Electronic Monitoring Policy Advisory Committee (GEM Committees) will hold a joint work session, which is open to the public.

DATES: The work session will be held May 7 and 8, 2014, from 9 a.m. until the earlier of 5 p.m. or when business for each day has been completed.

ADDRESSES: The work session will be held at the DoubleTree by Hilton Seattle Airport, 18740 International Blvd., Seattle, WA 97188, telephone: (206) 246–8600.

Council Address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Brett Wiedoff, Staff Officer, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The GEM Committees will hold a joint work session May 7 and 8, in Seattle, WA, to discuss development of an impact analysis for the Pacific Council's adopted alternatives for a potential electronic monitoring program currently being developed for the Pacific Coast Groundfish limited Entry Trawl Fishery, and any other results from the April Pacific Fishery Management Council meeting. No management actions will be decided at this work session. The work session will include review and discussion of the Council's adopted alternatives and other reports.

Although non-emergency issues not contained in the meeting agenda may come before the GEM Committees for discussion, those issues may not be the subject of formal action during this meeting. The work session will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the GEM committees' intent to take final action to address the emergency.

A meeting report will be prepared for consideration by the Pacific Council at its June 2014 meeting in Garden Grove, CA.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 16, 2014.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–09002 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Climate Assessment and Development Advisory Committee (NCADAC)

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of Open Meeting.

SUMMARY: This notice sets forth the schedule of a forthcoming meeting of the DoC NOAA National Climate Assessment and Development Advisory Committee (NCADAC).

Time and Date: The meeting will be held Tuesday, May 6, 2014 at a time to be determined. Please check the National Climate Assessment Web site at *http://www.globalchange.gov/what-we-do/assessment* or the NOAA NCADAC Web site *http://www.nesdis.noaa.gov/NCADAC/Meetings.html* for the exact date and time.

Place: This meeting will be a conference call. Public access and materials will be available at the office of the U.S. Global Change Research Program, Conference Room A, Suite 250, 1717 Pennsylvania Avenue NW., Washington, DC 20006. The public will not be able to dial into the call. Please check the National Climate Assessment Web site for additional information at *http://www.globalchange.gov/what-we-do/assessment.*

Status: The meeting will be open to public participation with a 5-minute public comment period. The NCADAC expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of two minutes. Written comments should be received in the NCADAC DFO's office by Wednesday, April 30, 2014 to provide sufficient time for NCADAC review. Written comments received by the NCADAC DFO after Wednesday, April 30, 2014 will be distributed to the NCADAC, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed no later than 12 p.m. on Wednesday, April 30, 2014 to Dr. Cynthia Decker, SAB Executive Director, SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910.

Matters To Be Considered: Please refer to the Web page *http://www.nesdis.noaa.gov/NCADAC/Meetings.html* for the most up-to-date meeting agenda, when available.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Designated Federal Officer, National Climate Assessment and Development Advisory Committee, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1156, Fax: 301–713–1459, Email: *Cynthia.Decker@noaa.gov.*

SUPPLEMENTARY INFORMATION: The National Climate Assessment and Development Advisory Committee was established in December 2010. The committee's mission is to synthesize and summarize the science and information pertaining to current and future impacts of climate change upon the United States; and to provide advice and recommendations toward the development of an ongoing, sustainable national assessment of global change impacts and adaptation and mitigation strategies for the Nation. Within the scope of its mission, the committee's specific objective is to produce a National Climate Assessment.

Dated: April 17, 2014.

Jamie Krauk,

Acting Chief Financial Officer/Chief Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2014–09118 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD228

Advisory Committee to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas (ICCAT); Spring Species Working Group Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Advisory Committee meeting.

SUMMARY: The spring meeting of the Advisory Committee (Committee) to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas (ICCAT) on March 4–5, 2014, was canceled due to a winter storm warning and temporary, weather-related closure of Washington, DC-area offices of the Federal Government. The meeting has been rescheduled for May 1–2, 2014, with a revised agenda. As originally planned, the Committee will meet with its Technical Advisors to discuss matters relating to ICCAT, including the 2013 Commission meeting results; research and management activities; global and domestic initiatives related to ICCAT; the Atlantic Tunas Convention Act-required report on any identification of countries that are diminishing the effectiveness of ICCAT; the results of meetings of the Committee's Species Working Groups; and other matters relating to the international management of ICCAT species. There will also be a closed session consultation to discuss the amendment of ICCAT's Convention.

DATES: The open sessions of the Committee meeting will be held on May 1, 2014, 8:45 a.m. to 12:45 p.m., and 3:30 p.m. to 4 p.m.; and May 2, 2014, 9 a.m. to 12:45 p.m. Closed sessions will be held on May 1, 2014, 1:30 p.m. to 3 p.m., and 4 p.m. to 6:30 p.m.; and on May 2, 2014, 8 a.m. to 9 a.m.

ADDRESSES: The meeting will be held at the Hilton Hotel, 1750 Rockville Pike, Rockville, MD 20852. The phone number is (301) 468–1100.

FOR FURTHER INFORMATION CONTACT: Rachel O'Malley at (301) 427–8373.

SUPPLEMENTARY INFORMATION: The Advisory Committee to the U.S. Section to ICCAT will meet in open session to receive and discuss information on the 2013 ICCAT meeting results and U.S. implementation of ICCAT decisions; NMFS research and monitoring activities; global and domestic initiatives related to ICCAT; the Atlantic Tunas Convention Act-required consultation on any identification of countries that are diminishing the effectiveness of ICCAT; the results of the meetings of the Committee's Species Working Groups; and other matters relating to the international management of ICCAT species. The public will have access to the open sessions of the meeting, but there will be no opportunity for public comment. A copy of the agenda is available from the Committee's Executive Secretary upon request (see **FOR FURTHER INFORMTION CONTACT** above).

The Committee will meet in its Species Working Groups for part of the afternoon of May 1, 2014, and for one hour on the morning of May 2, 2014. These sessions are not open to the public, but the results of the species working group discussions will be reported to the full Advisory Committee during the Committee's open session on May 2, 2014. In addition, the Committee will meet in closed session on the afternoon of May 1, 2014, to discuss sensitive information relating to upcoming international negotiations on the amendment of the ICCAT Convention.

Special Accommodations

The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Rachel O'Malley

at (301) 427–8373 at least 5 days prior to the meeting date.

Dated: April 16, 2014.

Jean-Pierre Plé,

Acting Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. 2014–09029 Filed 4–18–14; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 5/20/2014.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 12/20/2013 (78 FR 77105–77106) and 2/14/2014 (79 FR 8943–8944), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Bungee Rope, Flexible, w/Crimped Loops
NSN: 5340–00–NIB–0127—3 feet, Black
NSN: 5340–00–NIB–0129—5 feet, Black
NSN: 5340–00–NIB–0192—3 feet, Camouflage
NSN: 5340–00–NIB–0193—3 feet, Olive Drab
NSN: 5340–00–NIB–0194—3 feet, Orange
NSN: 5340–00–NIB–0195—3 feet, Tan
NSN: 5340–00–NIB–0196—5 feet, Camouflage
NSN: 5340–00–NIB–0197—5 feet, Olive Drab
NSN: 5340–00–NIB–0198—5 feet, Orange
NSN: 5340–00–NIB–0199—5 feet, Tan
NPA: L.C. Industries for the Blind, Inc., Durham, NC
Contracting Activity: DEFENSE LOGISTICS AGENCY TROOP SUPPORT, PHILADELPHIA, PA
COVERAGE: B-List for the Broad Government Requirement as aggregated by the Defense Logistics Agency, Philadelphia, PA.

Gauze, Petrolatum, Sterile, White, 36″ x 3″
NSN: 6510–01–362–4959
NPA: Lighthouse Works, Orlando, FL
Contracting Activity: DEFENSE LOGISTICS AGENCY TROOP SUPPORT, PHILADELPHIA, PA
COVERAGE: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Troop Support, Philadelphia, PA.

Services

Service Type/Location: Base Operations Support Service, National Geospatial-Intelligence Agency, NGA Campus West, 3200 S 2nd Street, St. Louis, MO
NPAs: ServiceSource, Inc., Alexandria, VA (Prime), CW Resources, Inc., New Britain, CT (Subcontractor)
Contracting Activity: DEPT OF DEFENSE, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, ARNOLD, MO

The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) administers the AbilityOne Program in accordance with statutory and regulatory requirements. Committee regulations at 41 CFR 51–2–4 state that for a commodity or service to be suitable for addition to the Procurement List (PL) each of the following criteria must be satisfied: employment potential; nonprofit agency qualifications, capability, and level of impact on the current contractor for the commodity or service.

Comments were received from the incumbent contractor. The contractor, an Alaska Native Corporation (ANC), states that the Committee should not add the project to the PL, as it would result in severe adverse impact on their firm and that the service cannot be performed as required by the Javits-Wagner-O'Day (JWOD) Act. The contractor lists several reasons why the service should not be added to the PL, including: The Base Operations Support (BOS) service is the ANC's largest contract, representing over 35% of its FY12 sales revenue; the contractor has been a continuous supplier of the service since 1999 and relies on its track record of successful performance; ANCs are defined as "economically disadvantaged business enterprises," which precludes the Committee from including its parent and affiliated corporations' financial sales revenue when assessing impact; and the addition would violate the intent of various statutes and regulations that confer contracting benefits on ANCs. The contractor also asserts that the BOS service contract will not generate employment for people with severe disabilities because they claim it cannot be performed using a 75% severely disabled workforce which they say is required by the JWOD Act for each service; and, they assert that the proposed AbilityOne nonprofit agency is not capable of performing the service or doing so at a fair market price.

Information provided by the contracting activity shows that the current contract for BOS service was awarded to the contractor as a large business in May 2009, following a full and open competition. The last option year ends on June 30, 2014. Following required government contracting protocols, the contracting activity conducted market research and developed an acquisition strategy seeking an AbilityOne nonprofit agency solution for the BOS service. The contracting activity has worked closely with the AbilityOne Program and the proposed nonprofit agency, and advises the Committee that it is fully confident of the technical capability of the nonprofit agency to perform the services using a workforce consisting of persons with severe disabilities. The contracting activity fully participated in the development of the recommended fair

market price considered by the Committee.

In accordance with its regulations, the Committee considers whether the addition of an item to the PL would likely have a severe adverse impact on the current contractor by evaluating the financial data of the current contractor and its affiliated and parent corporations. The Committee does not separate contractors into "economically disadvantaged business enterprise" categories when reviewing the requested financial information. The contractor refused to provide the financial information of its affiliated and parent corporations. Following its standard practice, without such information, the Committee was unable to determine whether the addition of the service to the PL would result in severe adverse impact or if the contractor was more dependent on the sales; therefore, the Committee notified the contractor that it was proceeding with development of the project.

The contractor claims that ANCs are granted certain contracting benefits which should prevent the Committee from adding this project to the PL. However, the Committee's responsibility is to implement the JWOD Act and the Government's policy to increase employment opportunities for people who are blind or severely disabled. The Committee's authority to determine whether products or services are suitable for procurement from people with significant disabilities is not precluded by the limited contract preferences afforded to ANCs. The Committee determines that the JWOD Act coexists with and remains relevant in light of the statutes that afford limited contract preference to ANCs.

The contractor is incorrect in alleging that the BOS service contract will not generate employment for people with severe disabilities since each function or service will not be performed using a 75% severely disabled workforce, thereby demonstrating that the nonprofit agency is incapable of performing the services or doing so at a fair market price. The JWOD Act has no requirement that each service involved in a contract be performed using a 75% disabled workforce. The Committee determines which services and products provided by qualified nonprofit agencies employing people who are blind or severely disabled are suitable to be added to the PL. A qualified nonprofit agency is one that employs people who are blind or severely disabled for not less than 75% of the direct labor hours involved in furnishing all goods and services provided by the nonprofit agency during the fiscal year, including those furnished outside the AbilityOne Program. The nonprofit agencies proposed to perform the work will maintain compliance with the statutory direct labor ratio requirement. Moreover, the information available to the Committee convincingly documents that the BOS service will generate employment for people with severe disabilities; that the nonprofit agency is capable of performing the services; and that the service can be performed at a fair market price established by the Committee.

Accordingly, after full consideration, the Committee has determined that the service in question is suitable for addition to the Procurement List.

Service Type/Location: Janitorial Service, U.S. Fish and Wildlife Service, Region 6, National Eagle and Wildlife Property Repository and Law Enforcement Office, (Except wildlife property storage area (warehouse)), 6550 Gateway Road, RMA, Building 128, Commerce City, CO

NPA: North Metro Community Services for Developmentally Disabled, Westminster, CO

Contracting Activity: DEPT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, CONTRACTING AND GENERAL SERVICES DIV, DENVER, CO

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2014–09005 Filed 4–18–14; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions from the Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be provided by the nonprofit agency employing persons who are blind or have other severe disabilities, and deletes products previously furnished by such agency.

DATES: *Comments Must Be Received On Or Before:* 5/20/2014.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to provide the services listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

The following services are proposed for addition to the Procurement List for provision by the nonprofit agency listed:

Services

Service Type/Locations: Building Operations and Maintenance Services

GSA, PBS, Region 2, Theodore Roosevelt US Courthouse, South Wing, Emanuel Celler U.S. Courthouse, North Wing, 225 Cadman Plaza East, Brooklyn, NY

GSA, PBS, Region 2, U.S. Post Office and Conrad B. Duberstein, Bankruptcy Courthouse, 271 Cadman Plaza East, Brooklyn, NY

NPA: Fedcap Rehabilitation Services, Inc., New York, NY

Contracting Activity: GSA/Public Buildings Service, Brooklyn, NY

Deletions

The following products are proposed for deletion from the Procurement List:

Products

Calendars

NSN: 7530–01–587–9589—DAYMAX System, 2013, JR Planner, 6-hole, Burgundy

NSN: 7530–01–587–9730—DAYMAX System, 2013, Planner, 7-hole, Desert Camouflage

NSN: 7530–01–587–9730L—DAYMAX System, 2013, Planner, 7-hole, Desert Camouflage

NSN: 7530–01–587–9702—DAYMAX System, 2013, LE Planner, 3-hole, Navy

NSN: 7530–01–587–9713—DAYMAX System, 2013, JR Deluxe Planner, 6-hole, Digital Camouflage, Black

NSN: 7530–01–587–9716—DAYMAX System, 2013, GLE Planner, 7-hole, Navy

NSN: 7530–01–587–9716L—DAYMAX System, 2013, GLE Planner, 7-hole, Navy w/logo

NSN: 7530–01–587–9713L—DAYMAX System, 2013, JR Deluxe Planner, 6-hole, Digital Camouflage, Black w/logo

NSN: 7530–01–587–9702L—DAYMAX System, 2013, LE Planner, 3-hole, Navy w/logo

NSN: 7530–01–587–9639—DAYMAX System, 2013, GLE Planner, 7-hole, Burgundy

NSN: 7530–01–587–9671—DAYMAX

System, 2013, GLE Planner, 7-hole, Black
NSN: 7530–01–587–9691—DAYMAX System, 2013, JR Deluxe Planner, 6-hole, Black
NSN: 7530–01–587–9698—DAYMAX System, 2013, JR Planner, 6-hole, Black
NSN: 7530–01–587–9698L—DAYMAX System, 2013, JR Planner, 6-hole, Black w/logo
NSN: 7530–01–587–9697—DAYMAX System, 2013, JR Planner, 6-hole, Navy
NSN: 7530–01–587–9697L—DAYMAX System, 2013, JR Planner, 6-hole, Navy w/logo
NSN: 7530–01–587–9691L—DAYMAX System, 2013, JR Deluxe Planner, 6-hole, Black w/logo
NSN: 7530–01–587–9671L—DAYMAX System, 2013, GLE Planner, 7-hole, Black w/logo
NSN: 7530–01–587–9639L—DAYMAX System, 2013, GLE Planner, 7-hole, Burgundy w/logo
NSN: 7530–01–587–9631—DAYMAX System, 2013, IE Planner, 3-hole, Navy
NSN: 7530–01–587–9631L—DAYMAX System, 2013, IE Planner, 3-hole, Navy w/logo
NSN: 7530–01–587–9610—DAYMAX System, 2013, IE Planner, 3-hole, Burgundy
NSN: 7530–01–587–9614—DAYMAX System, 2013, LE Planner, 3-hole, Black
NSN: 7530–01–587–9629—DAYMAX System, 2013, IE Planner, 3-hole, Black
NSN: 7530–01–587–9629L—DAYMAX System, 2013, IE Planner, 3-hole, Black w/logo
NSN: 7530–01–587–9614L—DAYMAX System, 2013, LE Planner, 3-hole, Black w/logo
NSN: 7530–01–587–9610L—DAYMAX System, 2013, IE Planner, 3-hole, Burgundy w/logo
NSN: 7530–01–587–9589L—DAYMAX System, 2013, JR Planner, 6-hole, Burgundy w/logo
NSN: 7530–01–587–9588—DAYMAX System, 2013, LE Planner, 3-hole, Burgundy
NSN: 7530–01–587–9588L—DAYMAX System, 2013, LE Planner, 3-hole, Burgundy w/logo
NSN: 7530–01–588–1508—DAYMAX System, 2014, Planner, 7-hole, Digital Camouflage
NSN: 7530–01–588–1508L—DAYMAX System, 2014, Planner, 7-hole, Digital Camouflage w/logo
NSN: 7510–01–545–3772—DAYMAX System, 2013, Calendar Pad, Type II
NSN: 7510–01–545–3779—DAYMAX System, 2013, Calendar Pad, Type I
NSN: 7530–01–545–3755—DAYMAX System, 2013, Appointment Refill
NSN: 7510–01–588–0112—DAYMAX System, 2013, Tabbed Monthly, JR, 6-hole
NSN: 7510–01–588–0127—DAYMAX System, 2013, Week at a View, GLE, 7-hole
NSN: 7510–01–588–0139—DAYMAX System, 2013, Month at a View, IE/LE, 3-hole
NSN: 7510–01–588–0148—DAYMAX System, 2013, Tabbed Monthly, IE/LE, 3-hole
NSN: 7510–01–588–0157—DAYMAX System, 2013, Day at a View, GLE, 7-hole
NSN: 7510–01–588–0162—DAYMAX System, 2013, Week at a View, IE/LE, 3-hole
NSN: 7510–01–588–0178—DAYMAX System, 2013, Tabbed Monthly, GLE, 7-hole
NSN: 7510–01–588–0186—DAYMAX System, 2013, Month at a View, GLE, 7-hole
NSN: 7510–01–588–0199—DAYMAX System, 2013, Day at a View, IE/LE, 3-hole
NSN: 7530–01–588–0104—DAYMAX System, 2013, DOD Planner, 3-hole, Burgundy
NSN: 7530–01–588–0104L—DAYMAX System, 2013, DOD Planner, 3-hole, Burgundy w/logo
NSN: 7530–01–588–0121—DAYMAX System, 2013, Planner, 7-hole, Woodland Camouflage
NSN: 7530–01–588–0121L—DAYMAX System, 2013, Planner, 7-hole, Woodland Camouflage w/logo
NSN: 7530–01–588–1523—DAYMAX System, 2013, Planner, 7-hole, Digital Camouflage
NSN: 7530–01–588–1523L—DAYMAX System, 2013, Planner, 7-hole, Digital Camouflage w/logo
NSN: 7510–01–589–0592—DAYMAX System, Replacement Binder, GLE, 7-hole, Zipper Closure, Digital Camouflage
NPA: Easter Seals Western and Central Pennsylvania, Pittsburgh, PA
Contracting Activity: General Services Administration, New York, NY

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2014–09006 Filed 4–18–14; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2014–OS–0049]

Privacy Act of 1974; System of Records; Correction

AGENCY: Defense Information Systems Agency, DoD.

ACTION: Notice to delete a System of Records Notice; correction.

SUMMARY: On April 9, 2014 (79 FR 19587), DoD published a notice deleting a Privacy Act System of Records notice, K890.10, Joint Enterprise Directory Services (JEDS). The Reason was written inaccurately, and this notice corrects the error.

FOR FURTHER INFORMATION CONTACT: Jeanette Weathers-Jenkins, 6916 Cooper Avenue, Fort Meade, MD 20755–7901, or (301) 225–8158.

SUPPLEMENTARY INFORMATION: On April 9, 2014 (79 FR 19587), DoD published a notice deleting a Privacy Act System of Records notice, K890.10, Joint Enterprise Directory Services (JEDS). Subsequent to the publication of that notice, DoD discovered that the Reason paragraph for the deletion was inaccurately written.

Correction

On page 19587, in the second column, in the "Deletion" paragraph, make the following correction:

DELETION:

K890.10, Joint Enterprise Directory Services (JEDS) (January 31, 2008, 73 FR 5825).

Reason: Based on a recent review of DISA systems of records notices, K890.10, Joint Enterprise Directory Services (JEDS) (January 31, 2008, 73 FR 5825), was decommissioned in September 2013; all records were destroyed in accordance with the approval NARA disposition schedule; therefore, K890.10, Joint Enterprise Directory Services (JEDS) can be deleted.

Dated: April 16, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–08989 Filed 4–18–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Academy Board of Visitors Notice of Meeting

AGENCY: U.S. Air Force Academy Board of Visitors

ACTION: Meeting Notice.

SUMMARY: In accordance with 10 U.S.C. 9355, the U.S. Air Force Academy (USAFA) Board of Visitors (BoV) will hold a meeting in the Longworth House Office Building, Room 1310, Washington, DC on June 17, 2014. The meeting will begin at 9:30 a.m. The purpose of this meeting is to review morale and discipline, social climate, curriculum, instruction, infrastructure, fiscal affairs, academic methods, and other matters relating to the Academy. Specific topics for this meeting include a Superintendent's Update, including a Diversity Update briefing, a Class of 2014 AFSC Composition and Class of 2018 Demographics Briefing, and a Summer Program Lineup Briefing; a Rated Accessions Briefing; an Inspector General Confidential Informant Out-brief; and a Board Recommendation Discussion. In accordance with 5 U.S.C.

552b, as amended, and 41 CFR 102–3.155, one session of this meeting shall be closed to the public because it involves matters covered by subsection (c)(6) of 5 U.S.C. 552b. Public attendance at the open portions of this USAFA BoV meeting shall be accommodated on a first-come, first-served basis up to the reasonable and safe capacity of the meeting room. In addition, any member of the public wishing to provide input to the USAFA BoV should submit a written statement in accordance with 41 CFR 102–3.140(c) and 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements must address the following details: The issue, discussion, and a recommended course of action. Supporting documentation may also be included as needed to establish the appropriate historical context and provide any necessary background information. Written statements can be submitted to the Designated Federal Officer (DFO) at the Air Force address detailed below at any time. However, if a written statement is not received at least 10 calendar days before the first day of the meeting which is the subject of this notice, then it may not be provided to or considered by the BoV until its next open meeting. The DFO will review all timely submissions with the BoV Chairman and ensure they are provided to members of the BoV before the meeting that is the subject of this notice. For the benefit of the public, rosters that list the names of BoV members and any releasable materials presented during the open portions of this BoV meeting shall be made available upon request.

If after review of timely submitted written comments and the BoV Chairman and DFO deem appropriate, they may choose to invite the submitter of the written comments to orally present the issue during an open portion of the BoV meeting that is the subject of this notice. Members of the BoV may also petition the Chairman to allow specific personnel to make oral presentations before the BoV. In accordance with 41 CFR 102–3.140(d), any oral presentations before the BoV shall be in accordance with agency guidelines provided pursuant to a written invitation and this paragraph. Direct questioning of BoV members or meeting participants by the public is not permitted except with the approval of the DFO and Chairman.

FOR FURTHER INFORMATION CONTACT: For additional information or to attend this BoV meeting, contact Maj Mark Cipolla, Accessions and Training Division, AF/A1PT, 1040 Air Force Pentagon, Washington, DC 20330, (703) 695–4066, *mark.cipolla@us.af.mil.*

Henry Williams,

Air Force Federal Register Liaison Officer.

[FR Doc. 2014–08978 Filed 4–18–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2014–ICCD–0015]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Annual Student Activities Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before May 21, 2014.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2014–ICCD–0015 or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted; ED will only accept comments during the comment period in this mailbox when the regulations.gov site is not available. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Mailstop L–OM–2–2E319, Room 2E103, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carmen Gordon, 202–219–7138.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Student Activities Report.

OMB Control Number: 1840–0781.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or households.

Total Estimated Number of Annual Responses: 100.

Total Estimated Number of Annual Burden Hours: 300.

Abstract: Section 703 of the Higher Education Act of 1965, as amended, authorizes the Secretary to award fellowships under the Jacob K. Javits Fellowship Program for graduate study in the arts, humanities, and social sciences. The fellowships support graduate students of superior ability selected on the basis of demonstrated achievement, exceptional promise and financial need. This information collection provides the U.S. Department of Education with information needed to determine if fellows have made substantial progress toward meeting the program's objectives and allows program staff to monitor and evaluate time-to-degree completion and the graduation rate of Javits fellows. Congress has mandated, through the Government Performance Results Act of 1993, that the U.S. Department of Education provide documentation regarding the progress being made by the program.

Dated: April 16, 2014.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2014–08982 Filed 4–18–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0156]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Race to the Top—District Annual Performance Report

AGENCY: Office of the Secretary/Office of the Deputy Secretary (OS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before May 21, 2014.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2014–ICCD–0156 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Stephanie Valentine, 202–401–0526 or electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here. We will ONLY accept comments in this mailbox when the regulations.gov site is not available to the public for any reason.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Race to the Top—District Annual Performance Report.

OMB Control Number: 1894–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 21.

Total Estimated Number of Annual Burden Hours: 1,113.

Abstract: On May 22, 2012, the Secretary announced the Race to the Top District program, which is designed to build on the momentum of other Race to the Top competitions by encouraging bold, innovative reform at the local level. In FY 2012, the Department awarded approximately $383 million to 16 Race to the Top District grantees representing 55 local educational agencies (LEAs), with grants ranging from $10 to $40 million. Applications for the FY 2013 competition are currently under peer review and the Department plans to make awards in December 2013 for a total of approximately $120 million. FY 2013 grantees will utilize the same Annual Performance Report (APR) template as FY 2012 Race to the Top District grantees.

In order to fulfill our responsibilities for programmatic oversight and public reporting, the Department has developed a Race to the Top District Annual Performance Report (APR) that is tied directly to the FY 2012 and FY 2013 Race to the Top District selection criteria and priorities previously established and published in the **Federal Register**. The report is grounded in the key performance targets included in grantees approved Race to the Top District plans. Grantees will be required to report on their progress improving student outcomes and implementing personalized learning environments, including narrative sections on progress and key performance indicators. Each grantee district will submit a Race to the Top District APR on an annual basis. The first report for the 16 FY 2012 districts is anticipated to be collected during spring 2014 with FY 2013 grantees reporting for the first time in spring 2015. Districts will submit the narrative elements and quantitative measures via an online data collection platform that will then be converted into a transparent public display.

Dated: April 15, 2014 .

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2014–08960 Filed 4–18–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Catalog of Federal Domestic Assistance (CFDA) Number: 84.063]

Annual Updates to the Income Contingent Repayment (ICR) Plan Formula for 2014—William D. Ford Federal Direct Loan Program

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces the annual updates to the ICR plan formula for 2014, as required by 34 CFR 685.209(a)(8), to give notice to Direct Loan borrowers and the public regarding how monthly ICR payment amounts will be calculated for the 2014–2015 year.

DATES: The adjustments to the income percentage factors for the ICR plan formula contained in this notice are effective from July 1, 2014, to June 30, 2015, for any borrower who enters the ICR plan or has his or her monthly payment amount recalculated under the ICR plan during that period.

FOR FURTHER INFORMATION CONTACT: Ian Foss, U.S. Department of Education, 830 First Street NE., Room 113H2, Washington, DC 20202. Telephone: (202) 377–3681 or by email: *ian.foss@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text

telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Under the William D. Ford Federal Direct Loan (Direct Loan) Program, borrowers may choose to repay their loans (Direct Subsidized Loans, Direct Unsubsidized Loans, Direct PLUS Loans made to graduate or professional students, and Direct Consolidation Loans) under the ICR plan. The ICR plan bases the borrower's repayment amount on the borrower's income, family size, loan amount, and the interest rate applicable to each of the borrower's loans.

A Direct Loan borrower who repays his or her loans under the ICR plan pays the lesser of: (1) The amount that he or she would pay over 12 years with fixed payments multiplied by an income percentage factor or (2) 20 percent of discretionary income.

Each year, to reflect changes in inflation, we adjust the income percentage factor used to calculate a borrower's ICR payment. We use the adjusted income percentage factors to calculate a borrower's monthly ICR payment amount when the borrower initially applies for the ICR plan or when the borrower submits his or her annual income documentation, as required under the ICR plan. This notice contains the adjusted income percentage factors for 2014, examples of how the monthly payment amount in ICR is calculated, and charts showing sample repayment amounts based on the adjusted ICR plan formula. This information is included in the following three attachments:

- *Attachment 1—Income Percentage Factors for 2014*
- *Attachment 2—Examples of the Calculations of Monthly Repayment Amounts*
- *Attachment 3—Charts Showing Sample Repayment Amounts for Single and Married Borrowers*

In Attachment 1, to reflect changes in inflation, we have updated the income percentage factors that were published in the **Federal Register** on June 4, 2013 (78 FR 33395). Specifically we have revised the table of income percentage factors by changing the dollar amounts of the incomes shown by a percentage equal to the estimated percentage change between the not-seasonally-adjusted Consumer Price Index for all urban consumers for December 2013 and December 2014.

The income percentage factors reflected in Attachment 1 may cause a borrower's payments to be lower than they were in prior years, even if the borrower's income is the same as in the prior year. However, the revised repayment amount more accurately reflects the impact of inflation on the borrower's current ability to repay.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT** in this section of the notice.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site, you can view this document, as well as all other documents of this Department published in the Federal Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 1087 et seq.

Dated: April 15, 2014

James W. Runcie,

Chief Operating Officer, Federal Student Aid

Attachment 1--Income Percentage Factors for 2014

Income Percentage Factors for 2014			
Single		Married/ Head of Household	
Income	% Factor	Income	% Factor
$10,877	55.00%	$10,877	50.52%
$14,966	57.79%	$17,162	56.68%
$19,258	60.57%	$20,452	59.56%
$23,646	66.23%	$26,737	67.79%
$27,838	71.89%	$33,123	75.22%
$33,123	80.33%	$41,604	87.61%
$41,604	88.77%	$52,177	100.00%
$52,178	100.00%	$62,756	100.00%
$62,756	100.00%	$78,622	109.40%
$75,425	111.80%	$105,058	125.00%
$96,579	123.50%	$142,072	140.60%
$136,787	141.20%	$198,695	150.00%
$156,839	150.00%	$324,683	200.00%
$279,358	200.00%		

Attachment 2—Examples of the Calculations of Monthly Repayment Amounts

General notes about the examples in this attachment:

- We have a calculator that borrowers can use to estimate what their payment amount would be under the ICR plan. The calculator is called the "Repayment Estimator" and is available at *StudentAid.gov/repayment-estimator.* This calculator provides a detailed, individualized assessment of a borrower's loans and repayment plan options, including the ICR plan.
- The interest rates used in the examples are for illustration only. The actual interest rates on an individual borrower's Direct Loans depend on the loan type and when the postsecondary institution first disbursed the Direct Loan to the borrower.
- The Poverty Guideline amounts used in the examples are from the 2014 U.S. Department of Health and Human Services (HHS) Poverty Guidelines for the 48 contiguous States and the District of Columbia. Different Poverty Guidelines apply to residents of Alaska and Hawaii. The Poverty Guidelines for 2014 were published in the **Federal Register** on January 22, 2014 (79 FR 3593).
- All of the examples use an income percentage factor corresponding to an adjusted gross income (AGI) in the table in Attachment 1. If your AGI is not listed in the income percentage factors table in Attachment 1, calculate the applicable income percentage by following the instructions under the heading later in this attachment.
- Married borrowers may repay their Direct Loans jointly under the ICR plan. If a married couple elects this option, we add the outstanding balance on the Direct Loans of each borrower and we add together both borrowers' AGIs to determine a joint ICR payment amount. We then prorate the joint payment amount for each borrower based on the proportion of that borrower's debt to the total outstanding balance. We bill each borrower separately.
- For example, if a married couple, John and Sally, has a total outstanding Direct Loan debt of $60,000, of which $40,000 belongs to John and $20,000 to Sally, we would apportion 67 percent of the monthly ICR payment to John and the remaining 33 percent to Sally. To take advantage of a joint ICR payment, married couples need not file taxes jointly; they may file separately and subsequently provide the other spouse's tax information to the borrower's Federal loan servicer.

Calculating the Monthly Payment Amount Using a Standard Amortization and a 12-Year Repayment Period.

The formula to amortize a loan with a standard schedule (in which each payment is the same over the course of the repayment period) is as follows:

$$M = P \times <(I \div 12) \div [1 - \{1 + (I \div 12)\} - - N]>$$

In the formula—

- M is the monthly payment amount;
- P is the outstanding principal balance of the loan at the time the calculation is performed;
- I is the annual interest rate on the loan, expressed as a decimal (for example, for a loan with an interest rate of 6.8 percent, 0.068); and
- N is the total number of months in the repayment period (for example, for a loan with a 12-year repayment period, 144 months).

For example, assume that Billy has a $10,000 Direct Unsubsidized Loan with an interest rate of 6.8 percent.

Step 1: To solve for M, first simplify the numerator of the fraction by which we multiply P, the outstanding principal balance. To do this divide I, the interest rate, as a decimal, by 12. In this example, Billy's interest rate is 6.8 percent. As a decimal, 6.8 percent is 0.068.

- $0.068 \div 12 = 0.005667$

Step 2: Next, simplify the denominator of the fraction by which we multiply P. To do this divide I, the interest rate, as a decimal, by 12. Then, add one. Next, raise the sum of the two figures to the negative power that corresponds to the length of the repayment period in months. In this example, because we are amortizing a loan to calculate the monthly payment amount under the ICR plan, the applicable figure is 12 years, which is 144 months. Finally, subtract one from the result.

- 0.068 ÷ 12 = 0.005667
- 1 + 0.005667 = 1.005667
- 1.005667 ^ -144 = 0.443119544
- 1 − 0.443119554 = 0.556880456

Step 3: Next, resolve the fraction by dividing the result from step one by the result from step two.

- 0.005667 ÷ 0.556880456 = 0.01017772

Step 4: Finally, solve for M, the monthly payment amount, by multiplying the outstanding principal balance of the loan by the result of step 3.

- $10,000 × 0.01017772 = $101.78

The remainder of the examples in this attachment will only show the results of the formula.

Example 1. Brenda is single with no dependents and has $15,000 in Direct Subsidized and Unsubsidized Loans. The interest rate on Brenda's loans is 6.80 percent, and she has an AGI of $27,838.

Step 1: Determine the total monthly payment amount based on what Brenda would pay over 12 years using standard amortization. To do this, use the formula that precedes Example 1. In this example, the monthly payment amount would be $152.67.

Step 2: Multiply the result of Step 1 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to Brenda's AGI. In this example, an AGI of $27,838 corresponds to an income percentage factor of 71.89 percent.

- 0.7189 × $152.66 = $109.75

Step 3: Determine 20 percent of Brenda's discretionary income and divide by 12 (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). For Brenda, subtract the Poverty Guideline amount for a family of one from her AGI, multiply the result by 20 percent, and then divide by 12:

- $27,838 − $11,670 = $16,168
- $16,168 × 0.20 = $3,233.60
- $3,233.60 ÷ 12 = $269.47

Step 4: Compare the amount from Step 2 with the amount from Step 3. The lower of the two will be the monthly ICR payment amount. In this example, Brenda will be paying the amount calculated under Step 2 ($109.75).

Example 2. Joseph is married to Susan and has no dependents. Joseph has a Direct Loan balance of $10,000, and Susan has a Direct Loan balance of $15,000. The interest rate on all of the loans is 6.80 percent.

Joseph and Susan have a combined AGI of $78,622 and are repaying their loans jointly under the ICR plan (for general information regarding joint ICR payments for married couples, see the fifth and sixth bullets under the heading "General notes about the examples in this attachment").

Step 1: Add Joseph's and Susan's Direct Loan balances to determine their combined aggregate loan balance:

- $10,000 + $15,000 = $25,000

Step 2: Determine the combined monthly payment amount for Joseph and Susan based on what both borrowers would pay over 12 years using standard amortization. To do this, use the formula that precedes Example 1. In this example, the combined monthly payment amount would be $254.44.

Step 3: Multiply the result of Step 2 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to Joseph and Susan's combined AGI. In this example, the combined AGI of $78,622 corresponds to an income percentage factor of 109.40 percent.

- 1.094 × $254.44 = $278.36

Step 4: Determine 20 percent of Joseph and Susan's combined discretionary income (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). To do this subtract the Poverty Guideline amount for a family of two from the combined AGI, multiply the result by 20 percent, and divide by 12:

- $78,622 − $15,730 = $62,892
- $62,892 × 0.20 = $12,578.40
- $12,578.40 ÷ 12 = $1,048.20

Step 5: Compare the amount from Step 3 with the amount from Step 4. The lower of the two will be Joseph and Susan's joint monthly payment amount. Joseph and Susan will jointly pay the amount calculated under Step 3 ($278.36).

Step 6: Because Joseph and Susan are jointly repaying their Direct Loans under the ICR plan, the monthly payment amount calculated under Step 4 applies to both Joseph and Susan's loans. To determine the amount for which each borrower will be responsible, prorate the amount calculated under Step 4 by each spouse's share of the combined Direct Loan debt. Joseph has a Direct Loan debt of $10,000 and Susan has a Direct Loan Debt of $15,000. For Joseph, the monthly payment amount will be:

- $10,000 ÷ ($10,000 + $15,000) = 40 percent
- 0.40 × $278.36 = $111.34

For Susan, the monthly payment amount will be:

- $15,000 ÷ ($10,000 + $15,000) = 60 percent
- 0.60 × $278.36 = $167.02

Example 3. David is single with no dependents and has $60,000 in Direct Subsidized and Unsubsidized Loans. The interest rate on all of the loans is 6.80 percent, and David's AGI is $33,123.

Step 1: Determine the total monthly payment amount based on what David would pay over 12 years using standard amortization. To do this, use the formula that precedes Example 1. In this example, the monthly payment amount would be $610.66.

Step 2: Multiply the result of Step 1 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to David's AGI. In this example, an AGI of $32,552 corresponds to an income percentage factor of 80.33 percent.

- 0.8033 × $610.66 = $490.54

Step 3: Determine 20 percent of David's discretionary income and divide by 12 (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). To do this subtract the Poverty Guideline amount for a family of one from David's AGI, multiply the result by 20 percent, then divide by 12:

- $33,123 − $11,670 = $21,453
- $21,453 × 0.20 = $4,290.60
- $4,290.60 ÷ 12 = $357.55

Step 4: Compare the amount from Step 2 with the amount from Step 3. The lower of the two will be David's monthly payment amount. In this example, David will be paying the amount calculated under Step 3 ($357.55).

Interpolation. If an income is not included on the income percentage factor table, calculate the income percentage factor through linear interpolation. For example, assume that Joan is single with an income of $50,000.

Step 1: Find the closest income listed that is less than Joan's income ($50,000)

and the closest income listed that is greater than Joan's income ($50,000).

Step 2: Subtract the lower amount from the higher amount (for this discussion we will call the result the "income interval"):

- $52,178 − $41,604 = $10,574

Step 3: Determine the difference between the two income percentage factors that correspond to the incomes used in Step 2 (for this discussion, we will call the result the "income percentage factor interval"):

- 100.00 percent − 88.77 percent = 11.23 percent

Step 4: Subtract from Joan's income the closest income shown on the chart that is less than Joan's income of $50,000:

- $50,000 − $41,604 = $8,396

Step 5: Divide the result of Step 4 by the income interval determined in Step 2:

- $8,396 ÷ $10,574 = 79.40 percent

Step 6: Multiply the result of Step 5 by the income percentage factor interval:

- 11.23 percent × 79.40 percent = 8.917 percent

Step 7: Add the result of Step 6 to the lower of the two income percentage factors used in Step 3 to calculate the income percentage factor interval for $50,000 in income:

- 8.917 percent + 88.77 percent = 97.69 percent (rounded to the nearest hundredth)

The result is the income percentage factor that we will use to calculate Joan's monthly repayment amount under the ICR plan.

Attachment 3—Charts Showing Sample Repayment Amounts for Single and Married Borrowers

BILLING CODE 4000–01–P

Sample First-Year Monthly Repayment Amounts for a Single Borrower at Various Income and Debt Levels										
	Family Size = 1									
	Direct Loan Debt									
Income	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000	$70,000	$80,000	$90,000	$100,000
$10,000	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
$12,500	$14	$14	$14	$14	$14	$14	$14	$14	$14	$14
$15,000	$56	$56	$56	$56	$56	$56	$56	$56	$56	$56
$17,500	$60	$97	$97	$97	$97	$97	$97	$97	$97	$97
$20,000	$63	$125	$139	$139	$139	$139	$139	$139	$139	$139
$22,500	$66	$132	$181	$181	$181	$181	$181	$181	$181	$181
$25,000	$69	$139	$208	$222	$222	$222	$222	$222	$222	$222
$30,000	$77	$153	$230	$306	$306	$306	$306	$306	$306	$306
$35,000	$84	$167	$251	$335	$389	$389	$389	$389	$389	$389
$40,000	$89	$177	$266	$355	$444	$472	$472	$472	$472	$472
$45,000	$94	$188	$282	$376	$470	$556	$556	$556	$556	$556
$50,000	$99	$199	$298	$398	$497	$597	$639	$639	$639	$639
$60,000	$102	$204	$305	$407	$509	$611	$712	$806	$806	$806
$70,000	$109	$217	$326	$435	$543	$652	$760	$869	$972	$972
$80,000	$116	$233	$349	$465	$582	$698	$815	$931	$1,047	$1,139

$90,000	$122	$244	$366	$488	$610	$732	$854	$976	$1,098	$1,220
$100,000	$127	$254	$382	$509	$636	$763	$891	$1,018	$1,145	$1,272
Sample repayment amounts are based on an interest rate of 6.80%										

Sample First-Year Monthly Repayment Amounts for a Married or Head-of-Household Borrower at Various Income and Debt Levels

	Family Size = 3									
	Direct Loan Debt									
Income	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000	$70,000	$80,000	$90,000	$100,000
$10,000	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
$12,500	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
$15,000	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
$17,500	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
$20,000	$4	$4	$4	$4	$4	$4	$4	$4	$4	$4
$22,500	$45	$45	$45	$45	$45	$45	$45	$45	$45	$45
$25,000	$67	$87	$87	$87	$87	$87	$87	$87	$87	$87
$30,000	$73	$146	$170	$170	$170	$170	$170	$170	$170	$170
$35,000	$79	$159	$238	$254	$254	$254	$254	$254	$254	$254
$40,000	$87	$174	$260	$337	$337	$337	$337	$337	$337	$337
$45,000	$93	$186	$280	$373	$420	$420	$420	$420	$420	$420
$50,000	$99	$198	$298	$397	$496	$504	$504	$504	$504	$504
$60,000	$102	$204	$305	$407	$509	$611	$670	$670	$670	$670
$70,000	$106	$212	$318	$425	$531	$637	$743	$837	$837	$837
$80,000	$112	$224	$337	$449	$561	$673	$785	$897	$1,004	$1,004
$90,000	$118	$236	$355	$473	$591	$709	$827	$945	$1,064	$1,170
$100,000	$124	$248	$373	$497	$621	$745	$869	$993	$1,118	$1,242
Sample repayment amounts are based on an interest rate of 6.80%										

[FR Doc. 2014–08966 Filed 4–18–14; 8:45 am]
BILLING CODE 4000–01–C

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development to Improve Services and Results for Children With Disabilities—Leadership Consortia in Sensory Disabilities and Disabilities Associated With Intensive Service Needs

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information

Personnel Development to Improve Services and Results for Children with Disabilities—Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs

Notice inviting applications for new awards for fiscal year (FY) 2014.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.325H.

DATES: *Applications Available:* April 21, 2014.

Deadline for Transmittal of Applications: June 5, 2014.

Deadline for Intergovernmental Review: August 4, 2014.

Full Text of Announcement

1. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State identified needs for highly qualified personnel in special education, related services, early intervention, and regular education to work with children, including infants and toddlers, with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research and experience, to be successful in serving those children.

Priorities: This competition has one absolute priority with two focus areas. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority is from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2014 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Personnel Development to Improve Services and Results for Children With Disabilities—Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs

Background

Over the last two decades, the need for leadership personnel who are prepared at the doctoral level to fill faculty positions in special education, early intervention, and related services has increased (Sindelar & Taylor, 1988; Smith & Lovett, 1987; Smith, Pion, & Tyler, 2004; Smith, Robb, West, & Tyler, 2010; Woods & Snyder, 2009). The need is even greater for faculty focusing on sensory disabilities or disabilities associated with intensive service needs. In many cases, the difficulty of recruiting doctoral-level faculty to fill vacant positions, combined with the high cost to universities of maintaining highly specialized programs, often put even long-standing programs at risk of being closed (Dilka, Haydon, & Mertens, 2007; Evans, Elliot, Hood, Driggs, Mori, & Johnson, 2005; Huebner, Merk Adam, Stryker, & Wolfe, 2004; Johnson, 2003). Faculty members in these programs are responsible for teacher and service provider preparation as well as conducting research on best practices. These faculty shortages will reduce the supply of effective teachers and service providers for this high need group of infants, toddlers, children, and youth with disabilities while also restricting the evidence base on best practices for supporting these populations.

Doctoral level personnel are also needed to serve in administrative positions in State educational agencies (SEAs), local educational agencies (LEAs), lead agencies (LAs), and early intervention services programs (EIS programs), where they supervise and evaluate the implementation of evidence-based interventions and instructional programs to make sure that State or local agencies are meeting the needs of children with disabilities. A shortage of doctoral-level personnel preparing service providers, conducting research on best practices, and serving as administrators at the State and local level can negatively affect the provision of services to children with sensory impairments and intensive service needs.

Few university programs include specialized training in sensory disabilities and few have training programs to address students with disabilities with intensive service needs. Those universities that have these programs often have only one faculty position because of shortages of highly skilled doctoral-level personnel and the high cost of maintaining these programs. Single-faculty programs are limited in the number of scholars they can prepare and mentor, and they are limited in the range of the academic curriculum and the diversity of opportunities available to scholars. The scarcity of specialized training programs in turn limits the opportunity for scholars to pursue doctoral degrees in these high-need areas. Often, these programs only admit a small number of scholars each year due to faculty constraints.

The Office of Special Education Programs (OSEP) has funded leadership preparation consortia in sensory disabilities (blind and visually impaired, deaf-blind, and deaf and hard of hearing) since 2004. The academic and career outcomes of consortium scholars are exceptional. The national median time to complete a doctorate in education is 11.7 years, while median time to completion for consortium scholars is 3.1 years (U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, 2013). Nationally, reported rates of attrition vary from 40–70 percent for doctoral programs in education (Washburn Moses, 2008), compared to the consortia rate of 6 percent. Further, all consortium scholars were immediately employed in leadership positions following completion of their degrees. Additional information about the consortia, the scholars, and program outcomes is located at the following Web sites: *www.salus.edu/nclvi/* and *www.salus.edu/nlesd/*.

The purpose of this priority is to support two leadership training consortia to prepare doctoral-level leaders in special education, early intervention, and related services. Each university consortium will prepare doctoral-level leaders with highly specialized skills, knowledge, and expertise in sensory disabilities or students with disabilities with intensive service needs, respectively. The consortia will prepare leaders who can act effectively in leadership positions in universities, SEAs, LEAs, LAs, EIS programs, or schools.

Priority

The purpose of the Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs [1] priority is to increase

[1] For the purpose of this absolute priority "intensive service needs" or "intensive, specialized service areas," refer to cases where infants, toddlers, preschoolers and children have a complex

the number of highly skilled doctoral leaders by funding two cooperative agreements to support two leadership training consortia to prepare doctoral-level leaders in special education, early intervention, and related services in two focus areas.

To be considered for funding under the Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs absolute priority, all program applicants must meet the application requirements contained in the priority. All projects funded under the absolute priority also must meet the programmatic and administrative requirements specified in the priority.

The requirements of this priority are as follows:

(a) Demonstrate, in the narrative section of the application under "Significance of the Project," how—

(1) The project addresses national needs for leadership personnel to administer programs or to provide, or prepare others to provide, interventions and services that improve outcomes of children with disabilities, ages birth through 21. To address this requirement, the applicant must—

(i) Present appropriate and applicable data demonstrating a national need for the leadership personnel the applicant proposes to prepare or, in cases where national data are not available, State or regional data demonstrating the need; and

(ii) Present data on the potential effectiveness of the proposed project in addressing the identified need for well-trained leadership personnel. These data could include the average amount of time it takes for program graduates to complete the program, the percentage of program graduates finding employment directly related to their preparation, and the professional accomplishments of program graduates (e.g., public service, honors, student outcome data, or publications) that demonstrate their leadership in special education, early intervention, or related services;

(2) Scholar competencies will be acquired through the completion of a scholar's university program of study where each is enrolled. Proposed consortia must also ensure that all scholars enrolled in the Consortium program participate in and complete, in addition to the scholar's university program of study, a unique Consortium curriculum designed to supplement and enhance each individual Consortium university's program of study by providing academic and professional opportunities and instruction that will relate to knowledge and skills needed by the leadership personnel the Consortium proposes to prepare, including knowledge of technologies designed to provide instruction. To address this requirement, the applicant must

(i) Identify the competencies needed by leadership personnel in postsecondary instruction, administration, policy development, professional practice, leadership, or research in order to administer programs or provide, or prepare others to provide, interventions and services that improve outcomes of children with disabilities, ages birth through 21; and

(ii) Provide the conceptual framework of the Consortium model of leadership preparation, including any empirical evidence of effectiveness, that will promote the acquisition of the identified competencies needed by leadership personnel and, where applicable, how these competencies relate to the competencies required in the specific areas of specialization and the competency requirements embedded in the Consortium curriculum.

(b) Demonstrate, in the narrative section of the application under "Quality of the Project Services," how—

(1) The project will recruit and support a minimum of 28 high-quality scholars. The Consortium may only recruit individuals with no current or previous enrollment in a doctoral training program in special education or a related service area. Consortium scholars must be first-time enrollees in a doctoral training program in special education or related service areas. The narrative must—

(i) Describe the selection criteria the applicant will use to identify high-quality applicants for admission in the program;

(ii) Describe the recruitment strategies the applicant will use to attract high-quality applicants and any specific recruitment strategies targeting high-quality applicants from traditionally underrepresented groups, including persons with disabilities; and

(iii) Describe the approach the applicant will use to help scholars complete the program.

(2) The project is designed to promote the acquisition of the competencies needed by leadership personnel to administer programs or provide, or prepare others to provide, interventions and services that improve outcomes of children with disabilities. To address this requirement, the applicant must—

(i) Describe how the components of the project, such as: (A) The Consortium curriculum; (B) internship or practicum experiences; (C) research requirements; (D) opportunities provided to scholars to analyze data; (E) opportunities provided to scholars to critique research and research methodologies; and (F) opportunities provided to scholars to practice newly acquired knowledge and skills, will enable the scholars to acquire the competencies needed by leadership personnel for postsecondary instruction, administration, policy development, professional practice, leadership, or research in special education, early intervention, or related services;

(ii) Describe how the components of the Consortium curriculum are integrated within and across the individual university program curricula in order to support the acquisition and enhancement of the identified competencies needed by leadership personnel in special education, early intervention, or related services;

(iii) Describe how the components of the Consortium prepare scholars to administer programs or provide, or prepare others to provide, interventions and services that improve outcomes, including college- and career-readiness, of children with disabilities in a variety of settings;

(iv) Describe the approach that faculty members will use to mentor scholars with the goal of helping them acquire competencies needed by leadership personnel and promote career goals in special education, early intervention, or related services;

(v) Describe how the project is designed to ensure that scholars have opportunities to work with faculty and scholars from other universities within the Consortium on research and analytical projects in order to support the acquisition of the competencies identified in paragraph (a)(2)(i); and

(vi) Describe how the project will align with and use resources, as appropriate, available through technical assistance centers, which may include centers funded by the Department.

(3) The project will establish and maintain an advisory committee. The advisory committee must—

(i) Consist of no fewer than five members, at least three of whom should be representatives of organizations or associations representing the interests of persons with disabilities (specifically the disability areas addressed by the project) and at least one of whom should be a representative of an SEA,

---

array of disabilities (e.g., multiple disabilities, significant physical disabilities) or require intensive interventions (i.e., that are specifically designed to address persistent learning or behavior difficulties, implemented with greater frequency and for an extended duration than is commonly offered in a typical classroom or early intervention setting, or which require early interventionists and educators to have knowledge and skills in implementing multiple evidence-based interventions).

LEA, or LA. Advisory committee members should be identified no later than six weeks from the award date;

(ii) Meet no less than twice per year during the project period with the project director and relevant project staff;

(iii) Provide feedback to project staff on the development and implementation of project curriculum and on the progress of the project toward meeting project goals; and

(iv) Assist in providing opportunities and mentorship for the scholars that will enhance their understanding of disability and provide them with experiences beyond the university setting.

(4) The project will establish and maintain a Web site containing relevant information and documents relating to the academic work, publications, presentations, and degree completion and employment status of scholars, and information about the universities and faculty participating in the project.

(c) Include, in the narrative section of the application under "Significance of the Project," a logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *www.researchutilization.org/matrix/logicmodel_resource3c.html* and *www.tadnet.org/pages/589.*

(d) In the narrative section of the application under "Quality of the Project Evaluation," include an evaluation plan as described in the following paragraphs. The evaluation plan must describe: Measures of progress in implementation and measures of outcomes or results of the project's activities in order to assess the effectiveness of those activities.

In designing the evaluation, the project must—

(1) Designate, with the approval of the OSEP project officer, a project liaison staff person with sufficient dedicated time, experience in evaluation, and knowledge of the project to work in collaboration with the Center to Improve Project Performance (CIPP),[2] the project director, and the OSEP project officer on the following tasks:

(i) Revise, as needed, the logic model submitted in the grant application to provide for a more comprehensive measurement of implementation and outcomes and to reflect any changes or clarifications to the model discussed at the kick off meeting;

(ii) Refine the evaluation design and instrumentation proposed in the grant application consistent with the logic model (e.g., preparing evaluation questions about significant program processes and outcomes, developing quantitative or qualitative data collections that permit both the collection of progress data, including fidelity of implementation, as appropriate, and the assessment of effectiveness, selecting respondent samples if appropriate, designing instruments or identifying data sources, and identifying analytic strategies); and

(iii) Revise, as needed, the evaluation plan submitted in the grant application such that it clearly—

(A) Specifies the measures and associated instruments or sources for data appropriate to the evaluation questions, suggests analytic strategies for those data, provides a timeline for conducting the evaluation, and includes staff assignments for completion of the plan;

(B) Delineates the data expected to be available by the end of the second project year for use during the project's review for continued funding described under the heading *Fourth and Fifth Years of the Project;* and

(C) Can be used to assist the project director and the OSEP project officer, with the assistance of CIPP, as needed, to specify the performance measures to be addressed in the project's Annual Performance Report;

(2) Cooperate with CIPP staff in order to accomplish the tasks described in paragraph (1) of this section; and

(3) Dedicate sufficient funds in each budget year to cover the costs of carrying out the tasks described in paragraphs (1) and (2) of this section and implementing the evaluation plan.

(e) Demonstrate, in the narrative under "Required Project Assurances" or appendices, as directed, that the following program requirements are met. The applicant must—

(1) Ensure that all scholars recruited into the Consortium can graduate from the program by the end of the grant's project period. The described scholar recruitment strategies, the program components and their sequence, and proposed budget must be consistent with this project requirement;

(2) Ensure that the project will meet the requirements in 34 CFR 304.23, particularly those related to informing all scholarship recipients of their service obligation commitment. Failure by a grantee to properly meet these requirements would be a violation of the grant award that could result in sanctions, including the grantee being liable for returning any misused funds to the department. Specifically, the grantee must prepare, and ensure that each scholarship recipient sign, the following two documents:

(i) A Pre-Scholarship Agreement prior to the scholar receiving a scholarship for an eligible program (OMB# 1820–0686); and

(ii) An Exit Certification immediately upon the scholar leaving, completing, or otherwise exiting that program (OMB# 1820–0686);

(3) Ensure that the project will meet the statutory requirements in section 662(e) through 662(h) of IDEA;

(4) Ensure that at least 65 percent of the total requested annual budget will be used for scholar support or provide justification in the application narrative for any designation less than 65 percent;

(5) Ensure that scholars work (e.g., as graduate assistants) no more than 20 hours per week while receiving scholarship support, and that, if they work, the work is specifically related to the acquisition of scholars' competencies and the requirements for their doctoral programs. Please note that nothing in this provision prohibits a scholar from meeting the service obligation requirements under section 662(h) of IDEA;

(6) Ensure that scholars are full-time, reside in close proximity to the university, and remain active in their degree programs until completion of their degrees or until grant funding ends;

(7) Ensure that the budget includes attendance of the project director at a three-day project directors' meeting in Washington, DC, during each year of the project. The budget should also provide for the attendance of scholars at the three-day project directors' meeting in Washington, DC, during at least one year of the project period;

(8) Ensure that the budget includes two in-person meetings for project scholars and faculty each year of the project. One meeting per year must be scheduled in Washington, DC. One meeting per year may be scheduled to coincide with a professional conference or meeting but must include designated

[2] The major tasks of CIPP are to guide, coordinate, and oversee the design of formative evaluations for every large discretionary investment (i.e., those awarded $500,000 or more per year and required to participate in the 3 + 2 process) in OSEP's Technical Assistance and Dissemination; Personnel Development; Parent Training and Information Centers; and Educational Technology, Media, and Materials programs. The efforts of CIPP are expected to enhance individual project evaluation plans by providing expert and unbiased technical assistance in designing the evaluations with due consideration of the project's budget. CIPP does not function as a third-party evaluator.

time for a meeting of project scholars and faculty; and

(9) Ensure that data will be submitted annually about each scholar who receives grant support. Applicants are encouraged to visit the Personnel Development Program Scholar Data Report Web site at: *http://oseppdp.ed.gov* for further information about this data collection requirement. Typically, data collection begins in January of each year, and grantees are notified by email about the data collection period for their grant. This data collection must be submitted electronically by the grantee and does not supplant the annual grant performance report required of each grantee for continuation funding (see 34 CFR 75.590).

Fourth and Fifth Years of the Project

In deciding whether to continue funding the project for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), as well as—

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review will be conducted during a one-day intensive meeting that will be held during the last half of the second year of the project period;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the project; and

(c) The quality, relevance, and usefulness of the project's products and services and the extent to which the project's products and services are aligned with the project's objectives and likely to result in the project achieving its intended outcomes.

Focus Areas

Within this absolute priority, the Secretary intends to support two cooperative agreements, one under Focus Area A and one under Focus Area B.

Focus Area A: Sensory Disabilities. In addition to the application requirements listed above, applicants submitting applications under Focus Area A must address the following requirements in the application narrative:

(a) Establish a Consortium comprised of institutions of higher education (IHEs) with existing programs that prepare scholars to work as doctoral leaders in the following sensory disability areas: Visual impairment and blindness, deaf-blindness, and deafness and hard of hearing;

(b) Include at least two IHEs with programs preparing scholars in each of the three areas of sensory disabilities listed in paragraph (a); and

(c) Include a letter of commitment from each proposed Consortium member stating the IHE's desire to be part of the proposed Consortium. OSEP will approve the Consortium members within six weeks after making the award; and

(d) Establish policies, procedures, standards, and guidelines for the work of the Consortium in the following areas: (1) Recruitment and selection of students who will be supported by the Consortium; (2) distribution of tuition and stipends among participating students; (3) measurement and reporting of student progress; (4) contingency planning in case of Consortium faculty losses; and (5) governance of the Consortium. The Consortium must submit these proposed policies, procedures, standards, and guidelines to the OSEP project officer for approval prior to their implementation.

Focus Area B: Disabilities Associated with Intensive Service Needs. The Secretary is interested in increasing the number of high-quality training programs in disability areas associated with intensive service needs by pairing new applicants with programs in these high-need areas with more experienced applicants in order to aid new applicants in expanding and improving their training programs and to increase the competitiveness of any future applications under the Department's leadership program (CFDA 84.325D). Under the consortium model, new applicants and their scholars should benefit from the experience of working collaboratively with applicants and their faculty members who have more experience with developing and writing applications, program improvement, program implementation, grants administration, and grants implementation. Given the results of the 2004 consortium, and the preliminary results of the 2009 consortium, we anticipate that university faculty and scholars in both new and more experienced university programs will continue to benefit from the experiences after the consortium project has ended.

In addition to the application requirements listed above, applicants submitting applications under Focus Area B must address the following requirements in the application narrative:

(a) Establish a Consortium comprised of IHEs that prepare scholars to work as doctoral leaders in special education, early intervention, and related services with students or children with disabilities who have high needs and require intensive intervention services. Programs in sensory disabilities are not included in this focus area;

(b) Include at least three IHEs that have received funding under at least one grant award under CFDA 84.325D since fiscal year (FY) 2004 in the specific high-need area under which the Consortium plans to prepare scholars;

(c) Include at least three doctoral preparation programs that have not received funding under CFDA 84.325D since FY 2004 in the specific high-need area under which the IHEs propose to prepare scholars;

(d) Include a letter of commitment from each proposed consortium member stating the IHE's desire to be part of the proposed Consortium. OSEP will approve the Consortium members within six weeks after making the award; and

(e) Establish policies, procedures, standards, and guidelines for the work of the Consortium in the following areas: (1) Recruitment and selection of students who will be supported by the Consortium; (2) distribution of tuition and stipends among participating students; (3) measurement and reporting of student progress; (4) contingency planning in case of Consortium faculty losses; and (5) governance of the Consortium. The Consortium must submit these proposed policies, procedures, standards, and guidelines to the OSEP project officer for approval prior to their implementation.

Note: Applicants must identify the specific focus area, Focus Area A or Focus Area B, under which they are applying for funding as part of the competition title on the application cover sheet (SF form 424, item 15). Programs in sensory disabilities may not submit an application or be included as a participating university program in an application under Focus Area B. Applicants may not submit the same proposal for more than one focus area. The Secretary will not consider either application if an applicant applies under both focus areas.

Note: For additional information regarding group applications, refer to 34 CFR 75.127, 75.128, and 75.129.

References

Dilka, K., Haydon, D., & Mertens, D.M. (2007). Program faculty demographics of deaf and hard of hearing teacher preparation programs. Paper presented at the Association of College Educators—Deaf & Hard of Hearing.

Evans, S., Eliot, M., Hood, J., Driggs, M., Mori, A., and Johnson, T. (2005, Fall). Assessing the special education faculty shortage: The crisis in California—A statewide study of the professoriate. *Teachers and Teacher Education Research: A Publication of the California Council on Teacher Education, 32,* 7–21.

Huebner, M.K., Merk-Adam, B., Stryker, D., & Wolfe, K.E. (2004). The national agenda for the education of children and youths with visual impairments, including those with multiple disabilities—revised. New York: American Foundation for the Blind.

Johnson, H.A. (2003). U.S. deaf education teacher preparation programs: A look at the present and a vision for the future (COPSSE Document No. IB–9). Gainesville, FL: University of Florida, Center of Personnel Studies in Special Education.

Sindelar, P.T., & Taylor, C. (1988). Supply and demand for doctoral personnel in special education and communication disorders. *Teacher Education and Special Education, 11,* 162–167.

Smith, D.D., & Lovett, D. (1987). The supply and demand of special education faculty members: Will the supply meet the demand? *Teacher Education and Special Education, 11,* 162–167.

Smith, D.D., Pion, G.M., & Tyler, N.C. (2004). Leadership personnel in special education: Can persistent shortages be resolved? In A.M. Sorells, H.J., Rieth & P.T. Sindelar (Eds.), *Critical Issues in Special Education: Access, Diversity, and Accountability* (pp. 258–276). New York: Pearson, Allyn, & Bacon.

Smith, D.D., Robb, S.M., West, J., & Tyler, N.C. (2010). The changing education landscape: How special education leadership preparation can make a difference for teachers and their students with disabilities. *Teacher Education and Special Education, 33*(1), 25–43.

U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics. (2013). Table 324.80. Statistical profile of persons receiving doctor's degrees, by field of study and selected characteristics: 2009–10 and 2010–11. In U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics (Ed.), *Digest of Education Statistics (2013 ed.).* Retrieved from *http://nces.ed.gov/programs/digest/d13/tables/dt13_324.80.asp.*

Wasburn-Moses, L. (2008). Satisfaction among current doctoral students in special education. *Remedial and Special Education, 29*(5), 259–268.

Woods, J., & Snyder, P. (2009). Interdisciplinary doctoral leadership training in early intervention. *Infants & Young Children, 22*(1), 32–34.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priorities in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485. (c) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreements.

Estimated Available Funds: $3,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2015 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $1,250,000–$1,500,000 per year.

Estimated Average Size of Awards: $1,275,000 per year.

Maximum Award: We will reject any application that proposes a budget exceeding $1,500,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: One award per Focus Area.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months with an optional additional 24 months based on performance. Applications must include plans for both the 36-month award and the 24-month extension.

III. Eligibility Information

1. *Eligible Applicants:* IHEs, private nonprofit organizations.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other: General Requirements*

(a) Recipients of funding under this program must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Each applicant for, and recipient of, funding under this program must involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.325H.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit and double-spacing requirement does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the

appendices. However, the page limit and double-spacing requirement does apply to all of Part III, the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

We will reject your application if you exceed the page limit in the application narrative section; or if you apply standards other than those specified in the application package.

3. *Submission Dates and Times:*

Applications Available: April 21, 2014.

Deadline for Transmittal of Applications: June 5, 2014.

Applications for grants under this competition *must be submitted electronically* using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: August 4, 2014.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one-to-two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data entered into the SAM database by an entity. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, you will need to allow 24 to 48 hours for the information to be available in Grants.gov and before you can submit an application through Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs competition, CFDA number 84.325H, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Leadership Consortia in Sensory Disabilities and Disabilities Associated with Intensive Service Needs competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.325, not 84.325H).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline

date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov*.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material. Additional, detailed information on how to attach files is in the application instructions.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Glinda Hill, U.S. Department of Education, 400 Maryland Avenue SW., Room 4063, Potomac Center Plaza (PCP), Washington, DC 20202–2600. FAX: (202) 245–7617.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325H), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325H), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Personnel Development to Improve Services and Results for Children with Disabilities Program. These measures include: (1) The percentage of Special Education Personnel Development projects that incorporate evidence-based practices into their curriculum; (2) the percentage of scholars completing Special Education Personnel Development-funded programs who are knowledgeable and skilled in evidence-based practices for infants, toddlers, children, and youth with disabilities; (3) the percentage of Special Education Personnel Development-funded scholars who exit preparation programs prior to completion due to poor academic performance; (4) the percentage of Special Education Personnel Development-funded degree/certification recipients who are working in the area(s) for which they were prepared upon program completion; (5) the percentage of Special Education

Personnel Development-funded degree/certification recipients who are working in the area(s) for which they were prepared upon program completion and who are fully qualified under IDEA; (6) the percentage of Special Education Personnel Development degree/certification recipients who maintain employment in the area(s) for which they were prepared for three or more years and who are fully qualified under IDEA; and (7) the Federal cost per fully qualified degree/certification recipient.

In addition, the Department will be gathering information on the following outcome measures: (1) The number and percentage of degree/certification recipients who are employed in high-need schools; (2) the number and percentage of degree/certification recipients who are employed in a school for at least three years; and (3) the number and percentage of degree/certification recipients whose employers are satisfied with the performance of the individuals.

Grantees may be asked to participate in assessing and providing information on these aspects of program quality.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Glinda Hill, U.S. Department of Education, 400 Maryland Avenue SW., Room 4063, PCP, Washington, DC 20202–2600. Telephone: (202) 245–7376.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., Room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: April 14, 2014.

Michael K. Yudin,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2014–08965 Filed 4–18–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Promoting the Readiness of Minors in Supplemental Security Income (PROMISE) Technical Assistance Center

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information

Promoting the Readiness of Minors in Supplemental Security Income (PROMISE) Technical Assistance Center

Notice inviting applications for a new award for fiscal year (FY) 2014.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.418T

DATES: *Applications Available:* April 21, 2014.

Deadline for Transmittal of Applications: June 5, 2014.

Deadline for Intergovernmental Review: August 4, 2014.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: Promoting the Readiness of Minors in Supplemental Security Income (PROMISE) is a joint initiative of the U.S. Department of Education, the U.S. Social Security Administration, the U.S. Department of Health and Human Services, and the U.S. Department of Labor. PROMISE is intended to improve the provision and coordination of services and supports for child Supplemental Security Income (SSI) recipients and their families to enable them to achieve improved outcomes and reduce their long-term reliance on SSI payments. In FY 2013, the Department funded six three-year model demonstration projects (MDPs) with an option for two additional years based on performance, for a total of five years under the PROMISE program. The purpose of this priority is to provide technical assistance to assist MDPs in the implementation of their projects and to increase their capacity to improve services and supports to child SSI recipients and their families. For further information about this program, please see the notice inviting applications for PROMISE published in the **Federal Register** on May 21, 2013 at 78 FR 29733 and the PROMISE Web site at *www.ed.gov/promise.*

Priority: We are establishing this priority for the FY 2014 grant competition in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

Background

The purpose of this priority is to fund one cooperative agreement for up to 48 months to establish and operate a PROMISE Technical Assistance Center (Center). The Center will provide technical assistance (TA) to the PROMISE program MDPs to support the implementation of these projects and increase their capacity to improve services and supports to child SSI recipients and their families.

In FY 2013, the Department funded six five-year MDPs under the PROMISE program to improve the education and employment outcomes of child SSI recipients and their families that may eventually lead to increased economic self-sufficiency and a reduction in their dependence on SSI payments. Each MDP must address several core features, including the: (a) Development of strong and effective partnerships; (b)

coordination of transition services and supports for child SSI recipients and their families; and (c) management of data collection and tracking of the MDPs' performance.

On the Department's behalf, the American Institutes for Research conducted a TA needs assessment of the MDPs, which identified the need for TA in addressing these core features. Specifically, the MDPs expressed the need for TA to train interagency coordinators and manage interagency systems, better engage parents and families, and ensure fidelity of implementation of MDP services and supports. In addition, MDP staff indicated needs for various areas of expertise (e.g., dropout prevention, mental health services, secondary transition evidence-based practices, scaling up evidence-based practices, and postsecondary education for youth with disabilities and their families).

TA is necessary to assist MDPs in meeting the requirement that they establish formal partnerships in their respective States among agencies and organizations involved in implementing services and supports for child SSI recipients and their families. TA in this area would assist MDPs in forming effective partnerships across multiple stakeholders, coordinating and managing systems across agencies, and supporting a shared leadership approach with interactions coalescing around issues, relevant participation, and collaboration (Cashman et al., 2014).

MDPs also need TA on coordinating services and supports for child SSI recipients and their families. The need for TA in this area in particular is evident given the findings of a recent U.S. Government Accountability Office (GAO) report (GAO–12–594) (hereafter "GAO, 2012"), describing the gaps in the coordination of transition support services provided by Federal, State, and local governments, as well as the limitations of the current structure of services to help child SSI recipients transition from high school to postsecondary education and competitive employment. The GAO concluded that it is difficult for providers to coordinate services across different programs (GAO, 2012).

Furthermore, TA focused on engaging parents specifically, as indicated in the MDP needs assessment, would support the MDPs in increasing their capacity to reach and provide services to the families of participating children. The GAO's findings on the difficulty faced by parents in navigating different transition programs for their children with disabilities support the need for TA in this area (GAO, 2012). In addition, the GAO indicated that families lacked sufficient information about, or awareness of, the full range of service options available after high school for students with disabilities (GAO, 2012). Given the nature of SSI eligibility criteria and the varied geographic locations of the MDPs, TA may also help MDPs reach underserved families, including those with limited English proficiency, or who are of Native American descent. For these reasons, TA would help MDPs address a particularly challenging set of issues for these populations of families and meet the requirements of the program.

MDPs also indicated that they could benefit from assistance in conducting formative evaluations consistent with their data collection plans. SSA has funded a national evaluator to conduct a rigorous evaluation of the MDPs using a randomized controlled trial design. However, the MDPs must independently conduct formative evaluations of their activities and some have hired their own evaluators. The Center must work with all evaluators to ensure coordinated TA, services, and products. In addition, since the MDPs will use these formative evaluations to assess their progress and inform their decision-making, they will benefit from receiving TA in data collection and the tracking of their performance. They will also need to receive TA to ensure they are implementing their models with fidelity.

To address the identified areas of need for TA, the Center funded under this priority will work in concert with each MDP to address the goals of the PROMISE program.

Priority

The purpose of this priority is to fund a cooperative agreement to establish and operate a PROMISE Technical Assistance Center (Center) that supports PROMISE Model Demonstration Projects (MDPs). At a minimum, the Center must meet the following expected outcomes:

(a) Improved skills of State and local personnel to support partnerships among agencies responsible for administering programs that provide services to MDP SSI recipients and their families.

(b) Improved implementation of interventions for MDP SSI recipients and their families, including a coordinated set of services and supports designed to improve the education and employment outcomes of MDP SSI recipients and their families.

(c) Increased knowledge that supports training to the families of participating children about—

(1) The parents' role in supporting and advocating for their children's education and employment goals; and

(2) Resources for improving the education and employment outcomes of the parents and the economic self-sufficiency of the family.

(d) Improved methods to develop and implement a plan for conducting a formative evaluation of each MDP activity and model, consistent with the proposed logic model and data collection plan, to assess the MDP's performance and progress in achieving its goals and inform decision making.

(e) Improved methods for collecting data and the capacity to track and manage MDP information, such as service participation and documentation sufficient to replicate MDPs.

In addition to these programmatic requirements, to be considered for funding under this priority, applicants must meet the application and administrative requirements in this priority. The Office of Special Education Programs (OSEP) encourages innovative approaches to meeting the following requirements:

(a) Demonstrate, in the narrative section of the application under "Significance of the Project," how the proposed Center will—

(1) Address the gaps and weaknesses of each MDP in forming partnerships, delivering services and supports for child SSI recipients and their families, conducting formative evaluations to allow for mid-course corrections, and providing TA and training for applicable State, regional, and local staff. To meet this requirement the applicant must:

(i) Demonstrate how the Center will analyze applicable State, regional, and local data to identify the training and information needs of each MDP in order to address gaps and weaknesses in forming partnerships, delivering services and supports for child SSI recipients and their families, conducting formative evaluations, and providing TA to MDP staff;

(ii) Demonstrate knowledge of current and previous issues and policy initiatives relating to the provision and coordination of services and supports for child SSI recipients and their families that enable them to achieve improved educational and employment outcomes and economic self-sufficiency; and

(iii) Present the best available information on promising strategies and practices, including, where available, evidence of the effectiveness of the

proposed strategies and practices, related to the provision and coordination of services and supports for child SSI recipients and their families.

(2) Result in each MDP's improved ability and capacity to form partnerships, deliver services and supports for child SSI recipients and their families, conduct formative evaluations allowing for mid-course corrections, and provide TA and training for applicable State, regional, and local staff.

(b) Demonstrate, in the narrative section of the application under "Quality of the Project Services," how the proposed Center will—

(1) Identify the needs of each MDP for TA and information that will improve the provision and coordination of services and supports for child SSI recipients and their families that result in changed educational and employment outcomes and economic self-sufficiency;

(2) Ensure equal access and treatment for members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. To meet this requirement, the applicant must describe how it will ensure that products and services meet the needs of the intended recipients and are produced in accessible formats and languages;

(3) Achieve its goals, objectives, and intended outcomes. To meet this requirement, the applicant must provide—

(i) Measurable intended outcomes for the proposed Center; and

(ii) The logic model by which the proposed Center will achieve its intended outcomes;

(4) Use a conceptual framework to develop project plans and activities, describing any underlying concepts, assumptions, expectations, beliefs, or theories, as well as the presumed relationships or linkages among them, and any empirical support for this framework;

(5) Be based on current research and make use of evidence-based practices. To meet this requirement, the applicant must describe:

(i) The current research on the effectiveness of partnerships (e.g., interagency collaboration), and a coordinated set of services and supports designed to improve the education and employment outcomes and economic self-sufficiency of child SSI recipients and their families (e.g., case management, benefits counseling, work-based learning experiences, parent training and information);

(ii) The current research about adult learning principles and implementation science and how this information will be used to provide training and TA to the MDPs; and

(iii) How the proposed Center will incorporate current research and evidence-based practices in the development and delivery of its TA and services;

(6) Develop products and provide services that are of high quality and sufficient intensity and duration to achieve the intended outcomes of the proposed Center. To address this requirement, the applicant must describe—

(i) How it proposes to identify or develop the knowledge base of current research and evidence-based practices designed to improve the education and employment outcomes and economic self-sufficiency of child SSI recipients and their families;

(ii) Its proposed approach to targeted, specialized TA,[1] which must identify the intended recipients of the products and services under this approach; and

(iii) Its proposed approach to intensive, sustained TA,[2] which must identify—

(A) The intended recipients of the products and services under this approach;

(B) Its proposed plan for assisting applicable State, regional, and local agencies with training systems that include professional development based on adult learning principles and coaching; and

(C) Its proposed plan for working with applicable State, regional, and local agencies to ensure communication among all levels to support interagency collaboration, resource and data sharing consistent with the consent requirements in the Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act confidentiality of information provisions[3] and any other Federal and State laws or regulations that govern the privacy or confidentiality of student information, and innovative methods of service and support provision;

(7) Develop products and implement services that maximize each MDP's efficiency. To address this requirement, the applicant must describe—

(i) How the proposed Center will use technology to achieve its intended outcomes;

(ii) With whom the proposed Center will collaborate and the intended outcomes of this collaboration; and

(iii) How the proposed Center will use non-project resources to achieve its intended outcomes.

(c) Demonstrate, in the narrative section of the application under "Quality of the Evaluation Plan," how—

(1) The proposed Center will collect and analyze data on specific and measurable goals, objectives, and intended outcomes of the Center. To address this requirement, the applicant must describe its—

(i) Proposed evaluation methodologies, including instruments, data collection methods, and analyses; and

(ii) Proposed standards or targets for determining effectiveness.

(2) The Center will use the evaluation results to examine the effectiveness of its implementation and its progress toward achieving intended outcomes; and

(3) The methods of evaluation will produce quantitative and qualitative data that demonstrate whether the Center achieved its intended outcomes.

(d) Demonstrate, in the narrative section of the application under "Adequacy of Project Resources," how

(1) The proposed Center will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key Center personnel, consultants, and subcontractors have the qualifications and experience to carry out the proposed activities and achieve the Center's intended outcomes;

[1] As used in this priority, "targeted, specialized TA" means TA service based on needs common to multiple recipients and not extensively individualized. A relationship is established between the TA recipient and one or more TA center staff. This category of TA includes one time, labor intensive events, such as facilitating strategic planning or hosting regional or national conferences. It can also include episodic, less labor intensive events that extend over a period of time, such as facilitating a series of conference calls on single or multiple topics that are designed around the needs of the recipients. Facilitating communities of practice can also be considered targeted, specialized TA.

[2] As used in this priority, "intensive, sustained TA" means TA services often provided onsite and requiring a stable, ongoing relationship between the TA center staff and the TA recipient. "TA services" are defined as a negotiated series of activities designed to reach a valued outcome. This category of TA should result in changes to policy, program, practice, or operations that support increased recipient capacity or improved outcomes at one or more systems levels.

[3] If agencies are sharing data contained in education records, the requirements in FERPA and the IDEA FERPA and its implementing regulations); and 20 U.S.C. 1417(c) and 34 CFR §§ 300.610–300.626 (IDEA confidentiality of information provisions).

(3) The applicant and any key partners have adequate resources to carry out the proposed activities; and

(4) The proposed costs are reasonable in relation to the anticipated results and benefits.

(e) Demonstrate, in the narrative section of the application under "Quality of the Management Plan," how—

(1) The proposed management plan will ensure that the Center's intended outcomes will be achieved on time and within budget. To address this requirement, the applicant must describe—

(i) Clearly defined responsibilities for key Center personnel, consultants, and subcontractors, as applicable; and

(ii) Timelines and milestones for accomplishing the Center's tasks;

(2) How key personnel and any consultants and subcontractors will be allocated to the Center and how these allocations are appropriate and adequate to achieve the Center's intended outcomes;

(3) The proposed management plan will ensure that the products and services provided are of high quality; and

(4) The proposed Center will benefit from a diversity of perspectives, including those of child SSI recipients and their families; agencies and organizations (e.g., State VR service providers, Workforce Development service providers, Medicaid service providers, Temporary Assistance for Needy Families service providers, developmental and intellectual disabilities service providers, mental health service providers); State educational agency officials as well as educators (e.g., special education and related services personnel under Part B of IDEA, transition personnel); TA providers; researchers; and policy makers, among others, in its development and operation.

(f) Address the following application requirements. The applicant must—

(1) Include in Appendix A a logic model that depicts, at a minimum, the goals, activities, outputs, and intended outcomes of the proposed Center. A logic model communicates how a Center will achieve its intended outcomes and provides a framework for both the formative and summative evaluations of the Center.

Note: The following Web sites provide more information on logic models: *www.researchutilization.org/matrix/logicmodel_resource3c.html* and *www.tadnet.org/pages/589;*

(2) Include in Appendix A a conceptual framework for the Center;

(3) Include in Appendix A person-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(4) Include in the budget attendance at the following:

(i) A one and one-half day kick-off meeting in Washington, DC, after receipt of the award, and an annual planning meeting in Washington, DC, with the OSEP project officer and other relevant staff during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP project officer and the grantee's project director or other authorized representative;

(ii) A two and one-half day project directors' conference in Washington, DC, during each year of the project period;

(iii) Two, two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP; and

(iv) A one-day intensive review meeting in Washington, DC, during the first half of the second year of the project period;

(5) Maintain a Web site that meets government or industry-recognized standards for accessibility.

Third and Fourth Years of the Project

In deciding whether to continue funding the Center for the third and fourth years, the Secretary will consider the requirements of 34 CFR 75.253(a), as well as

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review will be conducted during a one-day intensive meeting that will be held during the first half of the second year of the project period;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) The quality, relevance, and usefulness of the Center's products and services and the extent to which the project's products and services are aligned with its project's objectives and likely to result in the Center achieving its intended outcomes.

References

Cashman, J., Linehan, P., Purcell, L., Rosser, M., Schultz, S., & Skalski, S. (2014). Leading by convening: A blueprint for authentic engagement. Alexandria, VA: National Association of State Directors of Special Education.

U.S. Government Accountability Office. (July 12, 2012). Students with Disabilities: Better Federal Coordination Could Lessen Challenges in the Transition from High School (GAO–12–594). Washington, DC: Government Printing Office.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from this rulemaking requirement regulations governing the first grant competition under a new or substantially revised program authority. This is the first TA grant competition for this program under the Consolidated Appropriations Act, 2012 (Pub. L. 112–74), as incorporated into the Consolidated and Further Continuing Appropriations Act, 2013, (Pub. L. 113–6), and therefore qualifies for this exception. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priority. This priority will apply to the FY 2014 grant competition only and any subsequent year in which we make awards from the list of unfunded applicants from this competition.

Program Authority: Consolidated Appropriations Act, 2012 (Pub. L. 112–74), as incorporated into the Consolidated and Further Continuing Appropriations Act, 2013, (Pub. L. 113–6).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $2,000,000.

Maximum Award: We will reject any application that proposes a budget exceeding $500,000 for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies; local educational agencies (LEAs), including public charter schools that operate as LEAs and receive funding under Part B of IDEA;

IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other General Requirements:*

(a) Recipients of funding under this program must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Each applicant for, and recipient of, funding under this program must involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.418T.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit and double-spacing requirement does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the page limit and double spacing requirement does apply to all of Part III, the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

We will reject your application if you exceed the page limit in the application narrative section; or if you apply standards other than those specified in the application package.

3. *Submission Dates and Times:*

Applications Available: April 21, 2014.

Deadline for Transmittal of Applications: June 5, 2014.

Applications for grants under this competition *must be submitted electronically* using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: August 4, 2014.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one-to-two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data entered into the SAM database by an entity. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, you will need to allow 24 to 48 hours for the information to be available in Grants.gov. and

before you can submit an application through Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Promoting the Readiness of Minors in Supplemental Security Income (PROMISE) Technical Assistance Center competition, CFDA number 84.418T, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Promoting the Readiness of Minors in Supplemental Security Income (PROMISE) Technical Assistance Center competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.418, not 84.418T).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material. Additional, detailed information on how to attach files is in the application instructions.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem

you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Corinne Weidenthal, U.S. Department of Education, 400 Maryland Avenue SW., Room 4115, Potomac Center Plaza (PCP), Washington, DC 20202–2600. FAX: (202) 245–7617.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.418T), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery.

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.418T), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. *Note for Mail or Hand Delivery of Paper Applications:* If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:*

In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group

for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Department will work with the grantee to develop project performance measures based on the measurable goals, objectives, and intended outcomes of the Center, consistent with the priority's application and administrative requirements in paragraph(c) under the "Quality of the Evaluation Plan."

Note: The following Web site provides more information on writing performance measures: *http://www.tadnet.org/pages/589.*

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Corinne Weidenthal, U.S. Department of Education, 400 Maryland Avenue SW., Room 4115, PCP, Washington, DC 20202–2600. Telephone: (202) 245–6529.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., Room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: April 14, 2014.

Michael K. Yudin,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2014–08964 Filed 4–18–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

President's Advisory Commission on Asian Americans and Pacific Islanders

AGENCY: President's Advisory Commission on Asian Americans and Pacific Islanders; U.S. Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and agenda of the meeting of the President's Advisory Commission on Asian Americans and Pacific Islanders (Commission). The notice also describes the functions of the Commission. Notice of the meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: May 7 and May 8, 2014.

Times: May 7, 2014 from 8:30 a.m.–5:15 p.m. ET; May 8, 2014 from 12:00 p.m.–3:30 p.m. ET.

ADDRESSES: The Melrose Georgetown Hotel, 2430 Pennsylvania Ave. NW., Washington, DC 20037, Phone Number: 202–955–6400.

FOR FURTHER INFORMATION CONTACT: Bessie Chan, White House Initiative on Asian Americans and Pacific Islanders, Potomac Center Plaza, 550 12th Street SW., Washington, DC 20202; telephone: 202–245–6418, fax: 202–245–7166.

SUPPLEMENTARY INFORMATION: The President's Advisory Commission on Asian Americans and Pacific Islanders is established under Executive Order 13515, dated October 14, 2009 and subsequently continued and amended by Executive Order 13585. The Commission is governed by the provisions of the Federal Advisory Committee Act (FACA), (Pub. L 92–463; as amended, 5 U.S.C.A., Appendix 2)

which sets forth standards for the formation and use of advisory committees. According to Executive Order 13515, the Commission shall provide advice to the President, through the Secretary of Education and a senior official to be designated by the President, on: (i) the development, monitoring, and coordination of executive branch efforts to improve the quality of life of Asian Americans and Pacific Islanders (AAPIs) through increased participation in Federal programs in which such persons may be underserved; (ii) the compilation of research and data related to AAPI populations and subpopulations; (iii) the development, monitoring, and coordination of Federal efforts to improve the economic and community development of AAPI businesses; and (iv) strategies to increase public and private-sector collaboration, and community involvement in improving the health, education, environment, and well-being of AAPIs.

Agenda

The purpose of this meeting is to discuss current and future endeavors of the White House Initiative on Asian Americans and Pacific Islanders through strategic planning to help facilitate and focus its work; review the work of the White House Initiative on Asian Americans and Pacific Islanders; and determine key strategies to help meet the Commission's charge as outlined in Executive Order 13515.

Additional Information

Members of the public who would like to attend the meetings on May 7, 2014 and May 8, 2014, should R.S.V.P. to Bessie Chan via email at *Bessie.Chan@ed.gov* no later than May 2, 2014 at 3:00 p.m. EDT.

Individuals who will need accommodations for a disability in order to attend the meetings (e.g., interpreting services, assistive listening devices, or material in alternative format) should notify Bessie Chan at 202–245–6418, no later than April 23, 2014. We will attempt to meet requests for accommodations after this date, but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Due to time constraints, there will not be a public comment period at these meetings. However, individuals wishing to provide comments about the White House Initiative on Asian Americans and Pacific Islanders or the Commission may contact Bessie Chan via email at *Bessie.Chan@ed.gov*. Please include in the subject line the wording, "Public Comment."

Records are kept of all Commission proceedings and are available for public inspection at the office of the White House Initiative on Asian Americans and Pacific Islanders, U.S. Department of Education, Potomac Center Plaza, 550 12th Street SW., Washington, DC 20202, Monday–Friday during the hours of 8:30 a.m. to 5:00 p.m.

Electronic Access to this Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the internet at the following site: *www.ed.gov/news/fedregister/index.html*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC area at 202–512–1800.

Dated: April 16, 2014.

Jamienne S. Studley,

Acting Under Secretary, U.S. Department of Education.

[FR Doc. 2014–09024 Filed 4–18–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–68–000.

Applicants: Integrys Energy Group, Inc., Balfour Beatty Infrastructure Partners G, Upper Peninsula Power Company.

Description: Integrys Energy Group, Inc et al (Applicants) submit their Petition for issuance of Declaratory Orders.

Filed Date: 4/10/14.

Accession Number: 20140410–0030.

Comments Due: 5 p.m. ET 5/1/14.

Docket Numbers: EC14–75–000.

Applicants: American Electric Power Service Corporation.

Description: Application for Authorization to Transfer Jurisdictional Assets Under Section 203 of the Federal Power Act of American Electric Power Service Corporation, on behalf of its affiliates, Wheeling Power Company and AEP Generation Resources Inc.

Filed Date: 4/11/14.

Accession Number: 20140411–5202.

Comments Due: 5 p.m. ET 5/2/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2125–005.

Applicants: Judith Gap Energy LLC.

Description: Supplement to December 24, 2013 Triennial Report of Judith Gap Energy LLC.

Filed Date: 3/24/14.

Accession Number: 20140324–5220.

Comments Due: 5 p.m. ET 4/23/14.

Docket Numbers: ER10–2128–005.

Applicants: Wolverine Creek Energy LLC.

Description: Supplement to December 24, 2013 Triennial Report of Wolverine Creek Energy LLC.

Filed Date: 3/24/14.

Accession Number: 20140324–5134.

Comments Due: 5 p.m. ET 4/23/14.

Docket Numbers: ER10–2129–004.

Applicants: Grays Harbor Energy LLC.

Description: Supplement to December 24, 2013 Triennial Report of Gray's Harbor Energy LLC.

Filed Date: 3/24/14.

Accession Number: 20140324–5138.

Comments Due: 5 p.m. ET 4/23/14.

Docket Numbers: ER10–2298–004.

Applicants: Enserco Energy LLC.

Description: Notice of Change in Status to be effective 6/10/2014.

Filed Date: 4/11/14.

Accession Number: 20140411–5114.

Comments Due: 5 p.m. ET 5/2/14.

Docket Numbers: ER10–3079–006; ER12–126–008; ER11–2539–003; ER11–2540–003; ER11–2542–003.

Applicants: Tyr Energy, LLC, Trademark Merchant Energy, LLC, Plains End, LLC, Plains End II, LLC, Rathdrum Power, LLC.

Description: Amendment to December 27, 2013 Updated Market Power Analysis for Northwest Region of Tyr Energy, LLC, et al.

Filed Date: 3/19/14.

Accession Number: 20140319–5108.

Comments Due: 5 p.m. ET 4/23/14.

Docket Numbers: ER11–2154–003.

Applicants: Twin Eagle Resource Management, LLC.

Description: Notice of Change in Status to be effective 6/10/2014.

Filed Date: 4/11/14.

Accession Number: 20140411–5115.

Comments Due: 5 p.m. ET 5/2/14.

Docket Numbers: ER14–1194–001.

Applicants: Southwestern Public Service Company.

Description: 4–11–14_RS114 FCA–IMP–AMEND to be effective 3/1/2014.

Filed Date: 4/11/14.

Accession Number: 20140411–5203.

Comments Due: 5 p.m. ET 5/2/14.

Docket Numbers: ER14–1196–001.

Applicants: Southwestern Public Service Company.

Description: 4–11–14_RS115 FCA–IMP–AMEND to be effective 3/1/2014.

Filed Date: 4/11/14.
Accession Number: 20140411–5212.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1197–001.
Applicants: Southwestern Public Service Company.
Description: 4–11–14_RS116 FCA–IMP–AMEND to be effective 3/1/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5216.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1198–001.
Applicants: Southwestern Public Service Company.
Description: 4–11–14_RS117 FCA–IMP–AMEND to be effective 3/1/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5217.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1200–001.
Applicants: Southwestern Public Service Company.
Description: 4–11–14_RS136 FCA IMP_AMEND to be effective 3/1/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5218.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1201–001.
Applicants: Southwestern Public Service Company.
Description: 4–11–14_RS137 FCA IMP_AMEND to be effective 3/1/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5219.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1320–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2014–04–11_Northeast Power-ITC–AECI T–T IA Amendment to be effective 1/29/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5245.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1348–001.
Applicants: The Dow Chemical Company.
Description: Amendment to Petition (TDCC) to be effective 2/21/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5190.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1349–001.
Applicants: Union Carbide Corporation.
Description: Amendment to Petition (UCC) to be effective 2/21/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5201.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1702–000.
Applicants: Delmarva Power & Light Company, PJM Interconnection, L.L.C.
Description: Delmarva submits revisions to PJM OATT Att H–3A re loss factors-DE Cities/Towns to be effective 6/1/2014.
Filed Date: 4/10/14.
Accession Number: 20140410–5126.
Comments Due: 5 p.m. ET 5/1/14.
Docket Numbers: ER14–1703–000.
Applicants: NorthWestern Corporation.
Description: SA 715—Park Street Holdings Construction Agreement to be effective 4/12/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5067.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1704–000.
Applicants: Trans Bay Cable LLC.
Description: Revisions to Transmission Owner Tariff to be effective 4/23/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5098.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1705–000.
Applicants: California Independent System Operator Corporation.
Description: 2014–04–11_NVEnergy ABAOA_Amendment to be effective 6/11/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5133.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1706–000.
Applicants: Nevada Power Company.
Description: Rate Schedule No. 141 Tri-Party Interconnection_Operating Agreement—VEA_DOE to be effective 6/11/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5165.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1707–000.
Applicants: Public Service Company of New Mexico.
Description: PNM NextEra Revised TSA to be effective 5/1/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5173.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1708–000.
Applicants: Commonwealth Edison Company, PJM Interconnection, L.L.C.
Description: ComEd submits revisions to PJM OATT Att H–13A re Grand Prairie Incentive Request to be effective 5/21/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5184.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1709–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2014–04–11_SA 2521 ITC-Tuscola Wind Amended GIA (J202) to be effective 4/12/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5186.
Comments Due: 5 p.m. ET 5/2/14.
Docket Numbers: ER14–1710–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2014–04–11_SA 2523 ITC-Pheasant Run Amended GIA (J075) to be effective 4/12/2014.
Filed Date: 4/11/14.
Accession Number: 20140411–5188.
Comments Due: 5 p.m. ET 5/2/14.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES14–28–000.
Applicants: Upper Peninsula Power Company.
Description: Integrys Energy Group, Inc et al (Applicants) submit their Petition for issuance of Declaratory Orders.
Filed Date: 4/10/14.
Accession Number: 20140410–0030.
Comments Due: 5 p.m. ET 5/1/14.

Take notice that the Commission received the following foreign utility company status filings:

Docket Numbers: FC14–13–000.
Applicants: Varna Wind, Inc.
Description: Notification of Self Certification of Foreign Utility Company Status of Varna Wind, Inc.
Filed Date: 4/11/14.
Accession Number: 20140411–5195.
Comments Due: 5 p.m. ET 5/2/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 11, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–08929 Filed 4–18–14; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9909–64–Region–6]

Clean Water Act Section 303(d): Proposed Withdrawal of One Total Maximum Daily Load

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed withdrawal of one total maximum daily load.

SUMMARY: The Environmental Protection Agency (EPA) hereby issues notice of the proposed withdrawal of one Total Maximum Daily Load (TMDL) for lead, as found in the document titled "TMDLs for Lead and Siltation/Turbidity for Big Creek near Sheridan, Arkansas." The TMDL was established by EPA in March of 2008. This proposed withdrawal action will not affect the TMDLs for Siltation/Turbidity established in the same TMDL document.

The aforementioned withdrawal action is being proposed based upon EPA's determination that the lead TMDL for Big Creek near Sheridan (reach 08040203–904) should not have been established due to data quality concerns which have been recently identified. Such concerns relate primarily to the location of the ambient monitoring station for Big Creek near Sheridan, and its questionable representativeness of the reach when it was first listed in 2004. In May of 2008, the monitoring station was relocated to a new site which is more representative of the reach. Should new data indicate impairment for lead, the reach would be placed back on the 303(d) list, and a TMDL would be required at that time.

DATES: Comments on the proposed withdrawal action must be submitted in writing to the EPA on or before May 21, 2014. The EPA is limiting the scope of comments specifically to the withdrawal action described herein. The EPA is not accepting comments on any other portion of the TMDL document, including the TMDLs developed for Siltation/Turbidity on the same reach (08040203–904).

ADDRESSES: Comments limited to the proposed withdrawal of the TMDL for Lead for Big Creek near Sheridan, Arkansas should be sent to Evelyn Rosborough, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Avenue Dallas, TX 75202–2733, or emailed to *rosborough.evelyn@epa.gov*. The administrative record files for the TMDL are available for public inspection at the previously listed address. Please contact Evelyn Rosborough (via mail, email, or by calling (214) 665–7515) to schedule an inspection or to obtain copies of relevant supporting documents.

SUPPLEMENTARY INFORMATION: The TMDLs were developed under EPA Contract Number 68–C–02–108. The **Federal Register** (FR) notice of availability, seeking public comments on the draft TMDLs, was published on December 17, 2007 (72 FR 71409). Public comments were received by January 16, 2008, and a response to each comment was provided. The **Federal Register** notice of availability for the final TMDLs was published on August 14, 2008 (see 73 FR 47596).

FOR FURTHER INFORMATION CONTACT: Evelyn Rosborough, Water Quality Protection Division, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202 2733, (214) 665–7515.

Dated: April 7, 2014.

William K. Honker,

Director, Water Quality Protection Division, EPA Region 6.

[FR Doc. 2014–09009 Filed 4–18–14; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

AGENCY: Federal Election Commission.

DATE AND TIME: Wednesday, April 23, 2014 At 11:00 a.m. (or conclusion of audit hearing).

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED: Correction and Approval of Minutes for April 3, 2014.

Draft Advisory Opinion 2014–02: Make Your Laws PAC, Inc.

Audit Division Recommendation Memorandum on the Nebraska Democratic Party (NDP) (A11–18).

Proposed Final Audit Report on the State Democratic Executive Committee of Alabama (A11–22).

Management and Administrative Matters: Enhanced and Expanded Search Capability on the FEC's Web site.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2014–09103 Filed 4–17–14; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 6, 2014.

A. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Stephanie L. Gongopoulos*, Sioux Falls, South Dakota; to retain voting shares of Minnehaha Banshares, Inc., and thereby indirectly retain voting shares of First National Bank in Sioux Falls, both in Sioux Falls, South Dakota.

Board of Governors of the Federal Reserve System, April 16, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–08992 Filed 4–18–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or

the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 16, 2014.

A. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Klein Financial, Inc.,* Chaska, Minnesota, to acquire 100 percent of the voting shares of Prior Lake State Bank, Prior Lake, Minnesota.

Board of Governors of the Federal Reserve System, April 16, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–08990 Filed 4–18–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 6, 2014.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02210–2204:

1. *Blue Hills Bancorp, Inc.,* to engage *de novo* through its subsidiary, Blue Hills Funding Corporation, both in Hyde Park, Massachusetts, in extending credit and servicing loans pursuant to section 225.28(b)(1).

2. *Meridian Bancorp, Inc.,* Peabody, Massachusetts; to acquire Meridian Interstate Funding Corporation, Peabody, Massachusetts, and thereby engage in extending credit and servicing loans pursuant to section 225.28(b)(1).

Board of Governors of the Federal Reserve System, April 16, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–08991 Filed 4–18–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: Parts open to the public begin at 12:30 (Eastern Time) April 28, 2014.

PLACE: 10th Floor Board Meeting Room, 77 K Street NE., Washington, DC 20002.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Closed to the Public

1. Security

Parts Open to the Public

1. Approval of the minutes of the March 20, 2014 Board Member Meeting.
2. Monthly Reports.
   a. Monthly Participant Activity Report
   b. Monthly Investment Policy Review
   c. Legislative Report
3. Audit Status Summary
4. Fiduciary Oversight Program Summary (Department of Labor)
5. Annual Financial Audit (CliftonLarsonAllen)
6. Quarterly Vendor Financials Report
7. Budget Review

CONTACT PERSON FOR MORE INFORMATION: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: April 16, 2014.

Laurissa Stokes,

Assistant General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2014–09056 Filed 4–17–14; 11:15 am]

BILLING CODE 6760–01–P

FEDERAL TRADE COMMISSION

[File No. 131–0221]

Akorn Enterprises, Inc. and Hi-Tech Pharmacal Co., Inc.; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Orders to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 14, 2014.

ADDRESSES: Interested parties may file comments at *https://ftcpublic.commentworks.com/ftc/akornconsent* online or on paper, by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write "Akorn/Hi-Tech Pharmacal.—Consent Agreement; File No. 131–0221" on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/akornconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comments to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Lisa De Marchi Sleigh, Bureau of Competition, (202–326–2535), 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing consent

orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, having been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 14, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before May 14, 2014. Write "Akorn/Hi-Tech Pharmacal.—Consent Agreement; File No. 131–0221" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/akornconsent* by following the instructions on the web-based forms. If this Notice appears at *http://www.regulations.gov/#!home*, you also may file a comment through that Web site.

If you file your comment on paper, write "Akorn/Hi-Tech Pharmacal.—Consent Agreement; File No. 131–0221" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 14, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Analysis of Agreement Containing Consent Orders To Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Akorn Enterprises, Inc. ("Akorn") that is designed to remedy the anticompetitive effects in five generic pharmaceutical markets resulting from Akorn's acquisition of Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"). Under the terms of the proposed Consent Agreement, the parties are required to divest either Akorn's or Hi-Tech's rights and assets related to three generic ophthalmic prescription products: (1) Generic Ciloxan drops, (2) generic Ilotycin ointment, and (3) generic Quixin drops, and two topical anesthetic products, (4) generic Xylocaine jelly, and (5) EMLA cream (collectively, the "Products") to Watson Laboratories, Inc. ("Watson"), a wholly-owned subsidiary of Actavis plc.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, or make final the Decision and Order ("Order").

Pursuant to an Agreement and Plan of Merger dated August 26, 2013, Akorn proposes to acquire all of the voting securities of Hi-Tech, for approximately $640 million (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening current and/or future competition in U.S. markets for the following pharmaceutical products: (1) Generic Ciloxan drops, (2) generic Ilotycin ointment, (3) generic Quixin drops, (4) generic Xylocaine jelly, and (5) generic EMLA cream. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of suppliers in the relevant markets, each of which has or will have a limited number of market participants. In pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would have a direct and substantial anticompetitive effect on pricing.

The Proposed Acquisition would reduce current competition in markets for two generic prescription ophthalmic products—generic Ciloxan drops and generic Quixin drops—as well as reduce current competition in the markets for generic Xylocaine jelly and generic

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

EMLA cream, which are topical anesthetic prescription products. The structure of these markets is as follows:

- The generic Ciloxan opthalmic drops market currently has four suppliers: Akorn, with a market share of approximately 12%, Hi-Tech, with a market share of approximately 16%, Novartis Corporation ("Novartis"), with a market share of approximately 47%, and PACK Pharmaceuticals ("PACK"), with a market share of approximately 25%. The proposed transaction would reduce the number of suppliers in this market from four to three, and would give the merged firm a market share of approximately 28%.
- The generic Quixin ophthalmic drops market currently has three suppliers: Akorn, with a market share of approximately 15%, Hi-Tech, with a market share of approximately 23%, and PACK, with a market share of approximately 62%. The proposed transaction would reduce the number of suppliers in this market from three to two, and would give the merged firm a market share of approximately 38%.
- The generic Xylocaine jelly market has three suppliers: Akorn, with a market share of approximately 39%, Hi-Tech, with a market share of approximately 14%, and Amphastar Pharmaceuticals, Inc. ("Amphastar"), with a market share of approximately 47%. The proposed transaction would reduce the number of suppliers of generic Xylocaine from three to two, and would give the merged firm a market share in excess of 50%.
- The generic EMLA cream market currently has four suppliers: Akorn, with a market share of approximately 12%, Hi Tech, with a market share of approximately 62%, Novartis, with a market share of approximately 22%, and Global Pharmaceuticals ("Global") with a market share of approximately 3%. In addition to marketing generic EMLA, Akorn markets the branded product. The proposed transaction would reduce the number of suppliers in the generic market from four to three, and would give the merged firm a market share in excess of 70%.

The proposed transaction would also reduce future competition in the generic Ilotycin ophthalmic ointment market. Generic Ilotycin ophthalmic ointment is prescribed for the treatment of bacterial infections in the eye. Three firms currently supply generic Ilotycin: Akorn, Perrigo Company ("Perrigo"), and Bausch + Lomb, Inc. ("Bausch + Lomb"). Bausch + Lomb leads the market with a 57% share with Akorn and Perrigo having market shares of 31% and 12%, respectively. Hi-Tech appears poised to be the next entrant with a generic Ilotycin product and there are no other likely entrants for the foreseeable future. Akorn's acquisition of Hi-Tech would therefore deprive consumers of the increased competition and likely price reductions that would have occurred as a result of Hi-Tech's entry.

Entry

Entry into the markets for the Products would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The combination of drug development times and regulatory requirements, including U.S. Food and Drug Administration ("FDA") approval, is costly and lengthy. Industry participants also note that expertise and facilities associated with manufacturing topical products, including sterile products such as ophthalmic products is sufficiently specialized that a relatively small number of firms participate in such markets.

Effects

The Proposed Acquisition would likely cause significant anticompetitive harm to consumers in the relevant generic pharmaceutical markets by eliminating current and/or future competition in concentrated existing markets or in future generic markets.

In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply. Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the prices of the generic pharmaceutical products at issue continue to decrease with new entry even after a number of suppliers have entered these generic markets. Further, customers generally believe that having at least four suppliers in a generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.

The evidence shows that anticompetitive effects are likely to result from the proposed transaction, due to a decrease in the number of independent competitors in the markets at issue. In each of the current generic prescription markets, industry participants have indicated that the presence of Hi-Tech as a competitor has allowed them to negotiate lower prices from other suppliers, including Akorn, and has allowed them to locate additional supply in times of product shortages from their existing suppliers.

The evidence also shows that the Proposed Acquisition would eliminate significant future competition between Akorn and Hi-Tech. Although Hi-Tech does not currently have a marketed product in the generic Ilotycin market, the Proposed Acquisition eliminates the next most likely entrant from a very limited pool of future entrants.

By eliminating the significant current and future competition between the parties, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for these generic drugs, absent a remedy.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in each of the relevant product markets. Pursuant to the Consent Agreement, the parties are required to divest Akorn's or Hi-Tech's rights and assets related to the Products to Watson. Further, the proposed Consent Agreement requires Akorn to assign its contract manufacturing agreement for branded and generic EMLA to Watson. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Proposed Acquisition is consummated.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Watson is not an acceptable acquirer of the divested assets, or that the manner of the divestitures is not acceptable, the parties must unwind the sale of rights to Watson and divest the Products to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the Products if the parties fail to divest the Products as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order requires Akorn and Hi-Tech to take all action to maintain the economic viability, marketability, and competitiveness of the products to be divested until such time that they are transferred to a Commission-approved acquirer. Depending on the product, Akorn or Hi-Tech must transfer their respective manufacturing technologies for the Products to Watson and must supply Watson with these products during a transitional period.

The Commission has agreed to appoint Denise Smart from Smart Consulting Group, LLC to act as an

interim monitor to assure that Akorn and Hi-Tech expeditiously comply with all of their obligations and perform all of their responsibilities pursuant to the Consent Agreement. In order to ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Akorn and Hi-Tech to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–08950 Filed 4–18–14; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[Docket No. 9356]

Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 12, 2014.

ADDRESSES: Interested parties may file comments at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* online or on paper, by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write "Ardagh Group S.A and Saint-Gobain Containers, Inc. and Compagnie de Saint-Gobain,—Consent Agreement; Docket No. 9356" on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comments to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Catharine Moscatelli, Bureau of Competition, (202–326–2749), 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 3.25(f),16 CFR § 3.25(f), notice is hereby given that the above-captioned consent agreement containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 10, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before May 12, 2014. Write "Ardagh Group S.A and Saint Gobain Containers, Inc. and Compagnie de Saint Gobain, Consent Agreement; Docket No. 9356" on your comment. Your comment including your name and your state will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* by following the instructions on the web-based forms. If this Notice appears at *http://www.regulations.gov/#!home*, you also may file a comment through that Web site.

If you file your comment on paper, write "Ardagh Group S.A and Saint Gobain Containers, Inc. and Compagnie de Saint Gobain, —Consent Agreement; Docket No. 9356" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 12, 2014. You can find more information, including routine uses

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Ardagh Group S.A. ("Ardagh"). The purpose of the Consent Agreement is to remedy the anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers, Inc. ("Saint-Gobain") from Compagnie de Saint-Gobain. Under the terms of the Consent Agreement, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission. The Consent Agreement provides the acquirer the manufacturing plants and other tangible and intangible assets it needs to effectively compete in the markets for the manufacture and sale of glass containers to both beer brewers and spirits distillers in the United States. Ardagh must complete the divestiture within six months of the date it signs the Consent Agreement.

On January 17, 2013, Ardagh agreed to acquire Saint-Gobain from its French parent company, Compagnie de Saint-Gobain, for approximately $1.7 billion. This acquisition would concentrate most of the $5 billion U.S. glass container industry in two major competitors—Owens-Illinois, Inc. ("O–I") and the combined Ardagh/Saint-Gobain. These two major competitors would also control the vast majority of glass containers sold to beer brewers and spirits distillers in the United States. On June 28, 2013, the Commission issued an administrative complaint alleging that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become a part of the public record. After 30 days, the Commission will review the Consent Agreement and comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. The Parties

Ardagh, headquartered in Luxembourg, is a global leader in glass and metal packaging. Ardagh entered the United States glass container industry through two 2012 acquisitions—first acquiring a single-plant glass container manufacturer, Leone Industries, and then an eight-plant manufacturer, Anchor Glass Container Corporation ("Anchor"). Through the Anchor acquisition, Ardagh became the third-largest glass container manufacturer in the country, supplying glass containers for beer, spirits, non-alcoholic beverages, and food. Ardagh's nine glass container manufacturing plants are located in seven U.S. states.

Saint-Gobain is a wholly-owned U.S. subsidiary of Compagnie de Saint-Gobain, a French company which, among other businesses, manufactures and sells glass containers throughout the world. In the United States, Saint-Gobain is the second-largest glass container manufacturer, supplying beer, spirits, wine, non-alcoholic beverages, and food containers. Saint-Gobain operates 13 glass container manufacturing plants located in 11 U.S. states. Saint-Gobain, operates under the name "Verallia North America" or "VNA."

III. The Manufacture and Sale of Glass Containers to Brewers and Distillers in the United States

Absent the remedy, Ardagh's acquisition would harm competition in two relevant lines of commerce: the manufacture and sale of glass containers to (1) beer brewers, and (2) spirits distillers in the United States. Currently, only three firms—Owens-Illinois, Inc., Saint-Gobain, and Ardagh—manufacture and sell most glass containers to brewers and distillers in the United States. Collectively, these three firms control approximately 85 percent of the United States glass container market for brewers, and approximately 77 percent of the market for distillers.

The Commission often calculates the Herfindahl-Hirschman Index ("HHI") to assess market concentration. Under the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, markets with an HHI above 2,500 are generally classified as "highly concentrated," and acquisitions "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." In this case, both relevant product markets are already concentrated and the acquisition would increase the HHIs substantially. Absent the proposed remedy, the acquisition would increase the HHI by 782 points to 3,657 for glass beer containers, and by 1,072 points to 3,138 for glass spirits containers. With the proposed remedy, however, Ardagh's acquisition of Saint-Gobain will result in no increase in HHI in the glass container market for beer brewers and a 33 point HHI increase in the glass container market for distillers.

The relevant product markets in which to analyze the effects of the acquisition do not include other packaging materials, such as aluminum cans for beer or plastic bottles for spirits for several reasons. First, Ardagh and Saint-Gobain routinely identify each other and O–I as their most direct competitors, focusing their business strategies, market analysis, and pricing on glass container competition. Indeed, glass container pricing is not responsive to the pricing of other types of containers. Second, although brewers and distillers use aluminum and plastic packaging, respectively, for their products, these customers solicit and evaluate glass container bids independently of their can and plastic procurement efforts. Third, brewers and distillers demand glass so that they may maintain a premium image and brand equity and meet their consumers' expectations. Thus, brewers and distillers cannot easily or quickly substitute their glass container purchases with other packaging materials without jeopardizing the sale of their own products. Finally, Ardagh and Saint-Gobain distinguish glass containers from containers made with other materials based on qualities including oxygen impermeability, chemical inertness, and glass' ability to be recycled.

The United States is the appropriate geographic market in which to evaluate the likely competitive effects of the acquisition. Ardagh and Saint-Gobain each maintain geographically diverse networks of plants that manufacture and sell glass containers to brewers and distillers throughout the country. Most U.S. brewers and distillers have similar competitive glass container alternatives from which to choose, regardless of their geographic location. The relevant geographic market is no broader than the United States because product weight and logistics constraints limit brewers' and distillers' ability to purchase significant volumes of glass containers from outside the country.

IV. Effects of the Acquisition

Absent relief, the acquisition would result in an effective duopoly likely to

cause significant competitive harm in the markets for the manufacture and sale of glass containers to brewers and distillers. The glass container industry is a highly consolidated, stable industry, with low growth rates and high barriers to entry. The acquisition would increase the ease and likelihood of anticompetitive coordination between the only two remaining major suppliers. The acquisition would also eliminate direct competition between Ardagh and Saint-Gobain. Thus, the acquisition would likely result in higher prices and a reduction in services and other benefits to brewers and distillers.

V. Entry

Entry into the markets for the manufacture and sale of glass containers to brewers and distillers would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the acquisition. The glass container industry in the United States enjoys significant barriers to entry and expansion including the high cost of building glass manufacturing plants, high fixed operating costs, the need for substantial technological and manufacturing expertise, and long-term customer contracts. For these reasons, entry by a new market participant or expansion by an existing one, would not deter the likely anticompetitive effects from the acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring Ardagh to divest six of its nine glass container manufacturing plants in the United States to an acquirer within six months of executing the Consent Agreement. In addition, the Consent Agreement requires Ardagh to transfer all customer contracts currently serviced at those six plants to an acquirer through an agreement approved by the Commission.

Under the proposed Consent Agreement, Ardagh will divest six of the manufacturing plants that it acquired when it purchased Anchor in 2012, along with Anchor's corporate headquarters, mold and engineering facilities. The six plants produce glass containers for brewers and distillers and are located in: Elmira, NY; Jacksonville, FL; Warner Robins, GA; Henryetta, OK; Lawrenceburg, IN; and Shakopee, MN. Anchor's corporate headquarters, mold and engineering facilities are located in Tampa, FL, Zanesville, OH, and Streator, IL, respectively. Other assets that Ardagh will divest include customer contracts, molds, intellectual property, inventory, accounts receivable, government licenses and permits, and business records. In addition, the Consent Agreement limits Ardagh's use of, and access to, confidential business information pertaining to the divestiture assets.

Through the proposed Consent Agreement, the acquirer of these assets will be the third-largest glass container manufacturer in the United States. These assets replicate the amount of glass containers for beer and spirits that the third largest supplier offers today. The acquirer will own plants that span a broad geographic footprint, offer a well-balanced product mix, and have flexible manufacturing capabilities. Its presence will preserve the three-way competition that currently exists in the relevant markets and moderate the potential for coordination.

Ardagh must complete the divestiture within six months of signing the Consent Agreement. Pending divestiture, Ardagh is obligated to hold the divestiture assets separate and to maintain the viability, marketability and competitiveness of the assets. With the hold separate in place, the divested assets, under the direction of an experienced senior management team, will be in a position to compete in the glass industry, independent from Ardagh. A hold separate monitor will supervise the management of the divestiture assets until Ardagh completes the divestiture.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

Statement of the Federal Trade Commission [2]

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.'s proposed $1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively-priced supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where "(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability." [3] We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a "price over volume" strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on price and non-price terms to

[2] Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.*

achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.[4] The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.[5] In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of "extraordinary efficiencies."[6] Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.[7] Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims "[i]n most cases," even if they proved insufficient to offset competitive concerns about the transaction.[8]

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be "proven," potentially creating a "dangerous asymmetry" from a consumer welfare perspective.[9] We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipiency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms."[10] The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, "while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable."[11] This is for good reason. Indeed, "if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act."[12] The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

By direction of the Commission, Commissioner Wright dissenting.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Ardagh Group ("Ardagh") to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain (jointly, "St. Gobain"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential

[4] *See* 2010 Horizontal Merger Guidelines §§ 6, 6.2–6.3.

[5] *See id.* § 10.

[6] *Fed. Trade Comm'n* v. *Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'l, Inc.*, Initial Decision, No. 9327, 2010 WL 866178, at *184–85 (FTC Mar. 1, 2010).

[7] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997–2007* 14 n.31 (2009), *available at http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf*.

[8] Darron S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC*, 78 Antitrust L.J. 591, 602 (2013).

[9] Dissenting Statement of Commissioner Wright at 5.

[10] 2010 Horizontal Merger Guidelines § 10.

[11] *United States* v. *H&R Block, Inc.*, 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines § 10 (noting that it is "incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.").

[12] *H&R Block*, 833 F. Supp. 2d at 46.

competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small at Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider "any reasonably available and reliable information," including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys." [1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate "the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger." [2] In my view, the totality of record evidence supports an inference—though a fragile one—that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3] However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies "likely would be sufficient to reverse the merger's potential to harm customers in the relevant market." [4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are small.[5] The Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

II. When is there an efficiencies defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

---

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.1 (2010), *available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html* [hereinafter Merger Guidelines].

[2] *Id.*

[3] Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

[4] Merger Guidelines § 10.

[5] Merger Guidelines § 10 ("In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near monopoly," that the Merger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three to two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See, e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf*.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies." [7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory*. The second is whether the magnitudes of those burdens differ *in practice*. The Commission appears to answer the first question in the negative.[10] With respect to the second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claims when presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima facie burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission—and particularly the conclusion that cognizable efficiencies are nearly zero—without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies "do not insist upon a less restrictive alternative that is merely theoretical," there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that "the efficiency defense faces an impossibly high burden." [14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency enhancing. On the other hand, we are not

[7] Merger Guidelines § 10.

[8] *See, e.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* Merger Guidelines § 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131–0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (Mar. 2006), *available at http://www.justice.gov/atr/public/guidelines/215247.htm#44*.

[12] *See, e.g.*, Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due*, Antitrust Source, Dec. 2012, *available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf*.

[13] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347, 386–87 (2011). Professor Crane argues that "as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies," *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 Sup. Ct. Econ. Rev. 230 (2005).

able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to efficiencies under the same standard we apply to any other evidence of competitive effects.[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to "swallow the whole of Section 7 of the Clayton Act." A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

[FR Doc. 2014–08951 Filed 4–18–14; 8:45 am]
BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Plan Child Support Collection.

OMB No.: 0970–0017.

Description: The Office of Child Support Enforcement has approved a IV–D state plan for each state. Federal regulations require states to amend their state plans only when necessary to reflect new or revised federal statutes or regulations or material change in any state law, organization, policy, or IV–D agency operations. The requirement for submission of a state plan and plan amendments for the Child Support Enforcement program is found in sections 452, 454, and 466 of the Social Security Act.

Respondents: State IV–D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Plan	54	4	0.50	108
OCSE–21.U4	54	4	0.25	54

Estimated Total Annual Burden Hours: 162.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf*.

[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997–2007 (2009), *available at http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf*. Coate and Heimert find that "BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period." The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id.* at 26.

[17] For example, Professor Crane explains that "[i]f the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof." In addition, "[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle." Crane, *supra* note 11, at 387–88.

[18] *See, e.g.*, Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, in 2 William E. Kovacic: An Antitrust Tribute—Liber Amicorum (2014) (forthcoming), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270*; Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 Rev. Indus. Org. 145 (2011).

document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2014–09016 Filed 4–18–14; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Child and Family Services Plan (CFSP), Annual Progress and Services Review (APSR), and Annual Budget Expenses Request and Estimated Expenditures (CFS–101).

OMB No.: 0970–0426.

Description: Under title IV–B, subparts 1 and 2, of the Social Security Act (the Act), States, Territories, and Tribes are required to submit a Child and Family Services Plan (CFSP). The CFSP lays the groundwork for a system of coordinated, integrated, and culturally relevant family services for the subsequent five years (45 CFR 1357.15(a)(1)). The CFSP outlines initiatives and activities the State, Tribe or territory will carry out in administering programs and services to promote the safety, permanency, and well being of children and families. By June 30 of each year, States, Territories, and Tribes are also required to submit an Annual Progress and Services Report (APSR) and a financial report called the CFS–101. The APSR is a Yearly report that discusses progress made by a State, Territory or Tribe in accomplishing the goals and objectives cited in its CFSP (45 CFR 1357.16(a)). The APSR contains new and updated information about service needs and organizational capacities throughout the five year plan period. The CFS–101 has three parts. Part I is an annual budget request for the upcoming fiscal year. Part II includes a summary of planned expenditures by program area for the upcoming fiscal year, the estimated number of individuals or families to be served, and the geographical service area. Part III includes actual expenditures by program area, numbers of families and individuals served by program area, and the geographic areas served for the last complete fiscal year.

The Child and Family Services Improvement Act of 2006 amended Title IV–B, subparts 1 and 2, adding a number of requirements that affect reporting through the APSR and the CFS–101. Of particular note, the law added a provision requiring States (including Puerto Rico and the District of Columbia) to report data on caseworker visits (section 424(e) of the Act). States must provide annual data on 1) the percentage of children in foster care under the responsibility of the State who were visited on a monthly basis by the caseworker handling the case of the child; and 2) the percentage of the visits that occurred in the residence of the child. In addition, by June 30, 2008, States must set target percentages and establish strategies to meet the goal that; by October 1, 2011; at least 90 percent of the children in foster care are visited by their caseworkers on a monthly basis and that the majority of those visits occur in the residence of the child (section 424(e)(2)(A) of the Act).

Respondents: States, Territories, and Tribes must complete the CFSP, APSR, and CFS–101. Tribes and territories are exempted from the monthly caseworker visits reporting requirement of the APSR. There are approximately 180 Tribal entities that are eligible for IV–B funding. There are 52 States (including Puerto Rico and the District of Columbia) that must complete the CFSP, APSR, and CFS–101. There are a total of 232 possible respondents.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
APSR	232	1	76.58	17,766.56
CFSP	232	1	120.25	5,579.60
CFS–101, Parts I, II, and III	232	1	4.38	1,016.16
Caseworker Visits	52	1	99.33	5,165.16

Estimated Total Annual Burden Hours: 29,527 hours.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2014–08959 Filed 4–18–14; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0373]

Agency Information Collection Activities; Proposed Collection; Comment Request; Risk and Benefit Perception Scale Development

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the

proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a study, Risk and Benefit Perception Scale Development. The study is designed to test different ways of measuring consumers' benefit and risk perceptions after exposure to direct to consumer (DTC) prescription drug advertising.

DATES: Submit either electronic or written comments on the collection of information by June 20, 2014.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Risk and Benefit Perception Scale Development—(OMB Control Number 0910–New)

FDA requires that prescription drug advertisements be balanced in their presentation of risk and benefit information. Patients receive information on drugs not only from their doctors and pharmacies, through patient labeling and FDA mandated medication guides, but also online, on social networks and via DTC television and print advertising. Moreover, research suggests that consumers struggle with the concepts of risk and efficacy (Ref. 1) and often overestimate drug efficacy (Ref. 2). As a result, it is important for FDA to understand and accurately measure how consumers are making sense of this information and how it impacts decisions related to prescription drugs.

FDA's Office of Prescription Drug Promotion has an active research program that investigates how DTC advertising influences consumer knowledge, perceptions, and behavior. Consequently, FDA needs a pool of reliable and valid measurement items for assessing consumers' drug risk and benefit perceptions—as well as other elements of prescription drug decision making—consistently across studies. The purpose of this project is to create that measurement pool, thus increasing the rigor and efficiency of FDA's research.

Design: This research will be conducted in two stages.

Stage 1: Pretests

The purpose of the first study stage is to pretest the candidate measurement items to assess their psychometric properties and identify any measurement challenges (e.g., misinterpretation, lack of variance). We also will use the pretest to examine factors that may affect future study results and analyses (e.g., response scale midpoints, moderating variables).

We will conduct two sequential pretest waves (n = 500 per wave; n = 1,000 total) with the following target populations: (a) Individuals diagnosed with chronic pain; and (b) individuals diagnosed with hypertension. Each participant will be randomly assigned to view either a print ad or a television ad for a fictitious prescription drug indicated to treat chronic pain; or hypertension and will be asked to complete a brief online survey assessing their benefit/risk recall, benefit/risk perceptions, and attitudes toward the drug. Based on the pretest findings, we will revise and remove candidate items prior to full scale testing. The pretest study design is outlined in Exhibit 1.

EXHIBIT 1—PRETEST STUDY DESIGN

Wave	Medical condition		
	Chronic pain	Hypertension	
Wave 1	n = 250	n = 250	500
Wave 2	n = 250	n = 250	500
Total	500	500	1,000

Stage 2: Iterative Tests

In the second stage, we will conduct four sequential waves of iterative testing to fully assess the measurement properties of the candidate items and create the final pool of measurements. We will conduct the first two waves with members of the target populations (hypertension and chronic pain) to refine the measurement items for those groups and the second two waves with members of the general population who do not have the target health conditions to determine if measurement reliability and validity change when the advertised drug addresses a condition that study participants do not have (n = 2,500 per wave; n = 10,000).

Each participant will be randomly assigned to view either a print or television ad for a fictitious prescription drug for hypertension or chronic pain and will be asked to complete a brief online survey assessing their benefit/risk recall, benefit/risk perceptions, and attitudes toward the drug. In the first two waves, participants will view an ad that matches the sample's medical condition (chronic pain or hypertension). In the final two waves, half of the general population sample will be exposed to the chronic pain stimuli, and half will be exposed to the high blood pressure stimuli.

The first two waves are outlined in Exhibit 2, and the final two waves are outlined in Exhibit 3.

EXHIBIT 2—ITERATIVE TESTING DESIGN; ILLNESS POPULATION SAMPLE

Chronic pain ad					Hypertension ad				
Ad type	Drug risk level	Drug benefit level		Control	Ad type	Drug risk level	Drug benefit level		Control
		High	Low				High	Low	
Wave 1									
Print	High	n = 125	n = 125	n = 125	Print	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Television	High	n = 125	n = 125	n = 125	Television	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Wave 2									
Print	High	n = 125	n = 125	n = 125	Print	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Television	High	n = 125	n = 125	n = 125	Television	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	

EXHIBIT 3—ITERATIVE TESTING DESIGN; GENERAL POPULATION SAMPLE

Chronic pain ad					Hypertension ad				
Ad type	Drug risk level	Drug benefit level		Control	Ad type	Drug risk level	Drug benefit level		Control
		High	Low				High	Low	
Wave 3									
Print	High	n = 125	n = 125	n = 125	Print	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Television	High	n = 125	n = 125	n = 125	Television	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Wave 4									
Print	High	n = 125	n = 125	n = 125	Print	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	
Television	High	n = 125	n = 125	n = 125	Television	High	n = 125	n = 125	n = 125
	Low	n = 125	n = 125			Low	n = 125	n = 125	

Participants and Burden Hours and General Methods

Participants will be randomly assigned to view one version of a fictitious prescription drug ad (print or television). The drug risks and benefits in each ad will be manipulated into high or low conditions, creating four different ad versions: high benefit/high risk, high benefit/low risk, low benefit/high risk, and low benefit/low risk. There also will be a control condition in which the ad does not contain any risk or benefit information (reminder ad). The fictitious prescription drugs will be modeled on real drugs used to treat the same conditions and created with the input of medical experts.

During the study, we will expose participants to one of these fictitious ads and ask them to answer a series of questions about the fictitious drug. The questions represent the candidate measures we are testing in this study, and we will examine which measures are most sensitive/accurate in capturing participants' perceptions of the advertised drug. (For example, an accurate measure should detect different perceptions in a participant who sees a high benefit/high risk ad versus a participant who sees a low benefit/low risk ad.) We have designed the study and selected sample sizes (described previously) so that we will have sufficient statistical power to detect small-to-medium sized differences between the candidate measures and the ability to refine and re-test measures to ensure their accuracy.

For both the pretests and iterative tests, the questionnaire is expected to last no more than 20 minutes (the questionnaire is available upon request). This will be a one-time (rather than annual) collection of information. FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Screener	22,000	1	22,000	0.03 (2 minutes)	660
Pretest	1,000	1	1,000	0.33 (20 minutes)	330
Main Study	10,000	1	10,000	0.33 (20 minutes)	3,300

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Total					4,290

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

References

1. Lipkus, I.M. "Numeric, Verbal, and Visual Formats of Conveying Health Risks: Suggested Best Practices and Future Recommendations." *Medical Decision Making*, 27(5), 696–713 (2007).

2. Aikin, K.J., J.L. Swasy, and A.C. Braman. "Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs—Summary of FDA Survey Research Results." *Food and Drug Administration, Center for Drug Evaluation and Research*, 19 (2004).

Dated: April 14, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08957 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0001]

Oncologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Oncologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 25, 2014, from 8:30 a.m. to 3:30 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading "Resources for You," click on "Public Meetings at the FDA White Oak Campus." Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Caleb Briggs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *ODAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss new drug application (NDA) 206162, olaparib capsules, application submitted by AstraZeneca Pharmaceuticals LP. The proposed indication (use) for this product is as monotherapy for the maintenance treatment of adult patients with platinum-sensitive relapsed ovarian cancer (including fallopian tube or primary peritoneal) with germline BRCA mutation as detected by an FDA-approved test, who are in response (complete response or partial response) to platinum-based chemotherapy.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 11, 2014. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 3, 2014. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 4, 2014.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Caleb Briggs (see *Contact Person*) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 15, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08958 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0001]

Next-Generation Sequencing Technology, Data Formats Standardization and Promotion of Interoperability Protocols; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA), is announcing a public workshop entitled "Next-Generation Sequencing (NGS) Technology, Data Format Standardization and Promotion of Interoperability Protocols." The goal of this public workshop is to facilitate establishing protocols for ensuring the safety and quality of next-generation sequencing (NGS)-related information without sacrificing scientific merit or interfering with innovative processes. The purpose of the workshop is to engage NGS stakeholders in a forum to discuss the current use of the technology and the development of data standards of NGS-related information.

Date and Time: The public workshop will be held on September 24 and 25, 2014, from 8:30 a.m. to 4:30 p.m.

Location: The public workshop will be held at the National Institute of Health Campus, 9000 Rockville Pike, Bldg. 35, Rm. 610, Bethesda, MD 20892. Pre-registered participants will receive additional information on parking and public transportation with their email registration confirmation.

Contact Person: Khaled Bouri, Office of Regulatory Science and Innovation, Food and Drug Administration, 10903 New Hampshire Ave., Rm. 4164, Silver Spring, MD 20903, 301–796–8476, email: *Khaled.Bouri@fda.hhs.gov.*

Registration: Please go to http://ngs-data-standardization.eventbrite.com to register. There is no registration fee for the public workshop. Early registration is recommended because seating is limited. Registration will be confirmed by email. Registration on the day of the public workshop will be provided on a space available basis beginning at 8 a.m. This workshop will also be accessible via Webcast by following this link: *https://collaboration.fda.gov/NGSStandards/.*

If you need special accommodations due to a disability, please contact Khaled Bouri (see *Contact Person*) at least 7 days in advance.

Transcripts and Additional Information About the Workshop: The workshop agenda and additional background materials will be accessible at: *http://www.fda.gov/ScienceResearch/SpecialTopics/RegulatoryScience/ucm227840.htm.* Please be advised that as soon as possible after the public workshop a transcript will be available at the same Web site. Transcripts of the public workshop may also be requested in writing from the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Building, Rockville, MD 20857.

Dated: April 15, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08969 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0001]

Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 17, 2014, from 8 a.m. to 6 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading "Resources for You," click on "Public Meetings at the FDA White Oak Campus." Please note that visitors to the White Oak Campus must enter through Building. 1.

Contact Person: Abbas Bandukwala, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1535, Silver Spring MD 20993–0002, 301–796–6386, email: *Abbas.Bandukwala@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On June 17, 2014, the committee will discuss, make recommendations, and vote on information regarding the premarket application (PMA) for the Maestro® Rechargeable System sponsored by Enteromedics, Inc. The Maestro® Rechargeable System provides VBLOC Therapy. The implantable device is a neuromodulator, which delivers high frequency (5000 Hertz), controllable electrical pulses to the intra-abdominal vagus nerve trunks. The effect of VBLOC therapy is reported to suppress neural signals carried by the vagus nerve trunks, resulting in decreased hunger pangs, decreased digestive enzyme secretion and calorie absorption, and increased satiety. The device consists of implantable electronic device components that deliver VBLOC therapy, and external components that regulate device performance.

The proposed indication for use for the Maestro® Rechargeable System, as stated in the PMA, is as follows:

The Maestro® Rechargeable System is indicated for use in weight reduction in adult patients with obesity that have a Body Mass Index (BMI) of at least 40 kilograms per square meter (kg/m^2), or a BMI of at least 35 kg/m^2 with one or more obesity related comorbid conditions, and have failed a more conservative weight reduction alternative.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/*

AdvisoryCommittees/Calendar/default.htm. Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before May 13, 2014. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 5, 2014. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 6, 2014.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact James Clark at *James.Clark@fda.hhs.gov,* or 301–796–5293 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 15, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08970 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for Nonvoting Industry Representatives; Reopening of Notification Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the period for industry organizations interested in participating in the selection of nonvoting industry representatives to represent the interests of the pharmaceutical manufacturing industry and the pharmacy compounding industry on the Pharmacy Compounding Advisory Committee for the Center for Drug Evaluation and Research to notify FDA of such interest. FDA announced a request for notification of interest in selection of industry representatives and for nominations in the **Federal Register** on January 13, 2014. This notice requested industry organizations that were interested in participation in the selection process to notify FDA in writing by February 12, 2014, and stated that nominations would be accepted for the two nonvoting vacancies by the same date. Industry organizations that did not notify FDA by the deadline of their interest in participating in the selection of nonvoting pharmacy compounding and pharmaceutical manufacturing industry representatives have now expressed interest in participating. Therefore, FDA is reopening the notification period for an additional two weeks so that any interested industry organizations wanting to participate can notify the Agency of their interest.

DATES: Any industry organization interested in participating in the selection of appropriate nonvoting members to represent the interests of the pharmacy compounding industry and the pharmaceutical manufacturing industry on the Pharmacy Compounding Advisory Committee should send a letter stating the interest to FDA by *May 5, 2014,* for the vacancies announced in the **Federal Register** on January 13, 2014 (79 FR 2177).

ADDRESSES: All letters of interest should be submitted electronically to *PCAC@fda.hhs.govmailto:,* or in writing by mail to Jayne E. Peterson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Avenue, Bldg. 31, Rm. 2417, Silver Spring, MD 20993.

FOR FURTHER INFORMATION CONTACT: Jayne E. Peterson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993, 301–796–9001, FAX: 301–847–8533, email: *PCAC@fda.hhs.gov.*

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: April 15, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–08968 Filed 4–18–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Fogarty International Center Advisory Board.

Date: May 13, 2014.

Closed: May 13, 2014 8:00 a.m. to 9:45 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Lawton L. Chiles International House, Bethesda, MD 20892.

Open: May 13, 2014 10:00 a.m. to 4:00 p.m.

Agenda: Update and discussion of current and planned FIC activities, including global health studies, programs, and implementation of the Strategic Plan.

Place: National Institutes of Health, Lawton L. Chiles International House, Bethesda, MD 20892.

Contact Person: Robert Eiss, Public Health Advisor, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, (301) 496–1415, *EISSR@MAIL.NIH.GOV.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.fic.nih.gov/About/Advisory/Pages/default.aspx*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health HHS)

Dated: April 15, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–08946 Filed 4–18–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Strategy for Finding Cases of Moderate-to-Severe COPD.

Date: May 14, 2014.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Susan Wohler Sunnarborg, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National, Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, *sunnarborgsw@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, NHLBI Short Term Medical Student Research Experience.

Date: May 19, 2014.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA,National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: April 15, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–08944 Filed 4–18–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, NICHD.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the Eunice Kennedy Shriver National Institute Of Child Health And Human Development, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NICHD.

Date: June 6, 2014.

Closed: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31A, Conference Room 2A48, 31 Center Drive, Bethesda, MD 20892.

Contact Person: CONSTANTINE A. STRATAKIS, MD, D(med)Sci SCIENTIFIC DIRECTOR, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, Building 31A, Room 2A46, 31 Center Drive, Bethesda, MD 20892, 301–594–5984, *stratakc@mail.nih.gov.*

Information is also available on the Institute's/Center's home page:*http://www.nichd.nih.gov/about/meetings/2013/Pages/120613.aspx*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: April 15, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–08943 Filed 4–18–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Nursing Research.

Date: May 20–21, 2014.

Open: May 20, 2014, 1:00 p.m. to 5:00 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, C Wing, Room 6, Bethesda, MD 20892.

Closed: May 21, 2014, 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, C Wing, Room 6, Bethesda, MD 20892.

Contact Person: Ann R. Knebel, DNSC, RN, FAAN, Deputy Director, National Institute of Nursing Research, National Institutes of Health, 31 Center Drive, Building 31, Room 5B05, Bethesda, MD 20892, 301–496–8230, *knebelar@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nih.gov/ninr/a_advisory.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: April 15, 2014.

Michelle D. Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–08945 Filed 4–18–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Board on Medical Rehabilitation Research.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Advisory Board on Medical Rehabilitation Research.

Date: May 5–6, 2014.

Time: May 5, 2014, 9:00 a.m. to 5:00 p.m.

Agenda: NICHD Director's Report; NCMRR Acting Director's Report; Presentations by the Patient-Centered Outcomes Research Institute, the Food and Drug Administration, and the Center for Medicare and Medicaid Service; Coordinating Rehabilitation Research activities across NIH.

Place: Hilton Washington DC/Rockville, Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Time: May 6, 2014, 8:30 a.m. to 12:00 p.m.

Agenda: Research talk on Sleep by Board Member, Edgar Garcia-Rill, Ph.D.; Other business of the NABMRR.

Place: Hilton Washington DC/Rockville, Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Ralph M. Nitkin, Ph.D., Acting Director, National Center for Medical Rehabilitation Research (NCMRR) Director, Biological Sciences and Career Development Program, NCMRR, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS, 6100 Executive Boulevard, Room 2A03, Bethesda, MD 20892–7510, (301) 402–4206, *rn21e@nih.gov.*

Information is also available on the Institute's/Center's home page:

http://www.nichd.nih.gov/about/advisory/nabmrr/Pages/index.aspx where the current roster and minutes from past meetings are posted.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: *April 15, 2014.*

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–08941 Filed 4–18–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, through the use of automated collection techniques or other forms of information technology.

Proposed Project: Protection and Advocacy for Individuals With Mental Illness (PAIMI) Annual Program Performance Report (OMB No. 0930–0169)—Extension

The Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act at 42 U.S.C. 10801 et seq., authorized funds to the same protection and advocacy (P&A) systems created under the Developmental Disabilities Assistance and Bill of Rights Act of 1975, known as the DD Act (as amended in 2000, 42 U.S.C. 15001 et seq.]. The DD Act supports the Protection and Advocacy for Developmental Disabilities (PADD) Program administered by the Administration on Intellectual and Developmental

Disabilities (AIDD) within the Administration on Community Living. AIDD is the lead federal P&A agency. The PAIMI Program supports the same governor-designated P&A systems established under the DD Act by providing legal-based individual and systemic advocacy services to individuals with significant (severe) mental illness (adults) and significant (severe) emotional impairment (children/youth) who are at risk for abuse, neglect and other rights violations while residing in a care or treatment facility.

In 2000, the PAIMI Act amendments created a 57th P&A system—the American Indian Consortium (the Navajo and Hopi Tribes in the Four Corners region of the Southwest). The Act, at 42 U.S.C. 10804(d), states that a P&A system may use its allotment to provide representation to individuals with mental illness, as defined by section 42 U.S.C. 10802(4)(B)(iii) residing in the community, including their own home, only, if the total allotment under this title for any fiscal year is $30 million or more, and in such cases an eligible P&A system must give priority to representing PAIMI-eligible individuals, as defined by 42 U.S.C. 10802(4)(A) and (B)(i).

The Children's Health Act of 2000 (CHA) also referenced the state P&A system authority to obtain information on incidents of seclusion, restraint and related deaths [see, CHA, Part H at 42 U.S.C. 290ii–1]. PAIMI Program formula grants awarded by SAMHSA go directly to each of the 57 governor-designated P&A systems. These systems are located in each of the 50 states, the District of Columbia, the American Indian Consortium, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

The PAIMI Act at 42 U.S.C. 10805(7) requires that each P&A system prepare and transmit to the Secretary HHS and to the head of its State mental health agency a report on January 1. This report describes the activities, accomplishments, and expenditures of the system during the most recently completed fiscal year, including a section prepared by the advisory council (the PAIMI Advisory Council or PAC) that describes the activities of the council and its independent assessment of the operations of the system.

The Substance Abuse Mental Health Services Administration (SAMHSA) proposes no revisions to its annual PAIMI Program Performance Report (PPR), including the advisory council section, at this time for the following reasons: (1) AIDD is currently piloting a PADD PPR. The results of the pilot will not be available until October 2014 (FY 2015). (2) when the AIDD/ACL PPR is final, SAMHSA will revise its PPR, as appropriate, for consistency with the annual reporting requirements under the PAIMI Act and Rules [42 CFR part 51]; (3) SAMHSA will develop a mechanism to facilitate electronic submission of the annual PAIMI PPR and ACR as recommended in the *Evaluation of the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Program, Phase III. Evaluation Report al Report* (SAMHSA (2011). *Evaluation of the Protection and Advocacy for Individuals With Mental Illness (PAIMI) Program, Phase III. Final Report.* HHS Pub. No. PEP12–EVALPAIMI. Rockville, MD: CMHS, SAMHSA). (4) GPRA requirements for the PAIMI Program will be revised as appropriate to ensure that SAMHSA obtains information that closely measures actual outcomes of programs that it funds and (5) SAMHSA will reduce wherever feasible the current reporting burden by removing any information that does not facilitate evaluation of the programmatic and fiscal effectiveness of a state P&A system. The current report formats will be effective for the FY 2014 PPR reports due on January 1, 2015.The annual burden estimate is as follows:

	Number of respondents	Number of responses per respondent	Hours per response	Total hour burden
Program Performance Report	57	1	26	1,482
Advisory Council Report	57	1	10	570
Total	57			2,052

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 or email her a copy at *summer.king@samhsa.hhs.gov.* Written comments should be received by June 20, 2014.

Summer King,

Statistician.

[FR Doc. 2014–08977 Filed 4–18–14; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Agency Information Collection Activities: Various Contract Related Forms That Will Be Included in the Homeland Security Acquisition Regulation, DHS Form 0700–01, DHS Form 0700–02, DHS Form 0700–03, DHS FORM 0700–04

AGENCY: Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, DHS.

ACTION: 60-Day Notice and request for comments; Extension without Change, 1600–0002

SUMMARY: The Department of Homeland Security, Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

DATES: Comments are encouraged and will be accepted until June 20, 2014. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Written comments and questions about this Information Collection Request should be forwarded to the Office of the Chief Procument Officer, Acquisition Policy and Legislation Office, DHS Attn.: Camara Francis, Department of Homeland Security, Office of the Chief Procurement Officer, Room 3114, Washington, DC 20528, *Camara.Francis@hq.dhs.gov,* 202- 447 5904.

SUPPLEMENTARY INFORMATION: This information collection under the Homeland Security Acquisition Regulation (HSAR) is necessary in order to implement applicable parts of the FAR (48 CFR). The four forms under this collection of information request are used by offerors, contractors, and the general public to comply with requirements in contracts awarded by the Department of Homeland Security (DHS). The four forms are DHS Form 0700–01, Cumulative Claim and Reconciliation Statement; DHS Form 0700–02, Contractor's Assignment of Refund, Rebates, Credits and Other Amounts; DHS Form 0700–03, Contractor's Release; and DHS Form 0700–04, Employee Claim for Wage Restitution. These four forms will be used by contractors and/or contract employees during contract administration.

The information will be used by DHS contracting officers to ensure compliance with terms and conditions of DHS contracts and to complete reports required by other Federal agencies such as the General Services Administration and the Department of Labor. If this information is not collected, the DHS could inadvertently violate statutory or regulatory requirements and the DHS's interest concerning inventions and contractor's claims would not be protected.

There has been an increase in the estimated annual burden hours previously reported for this collection. An adjustment in annual burden is necessary at this time in the amount of 902 actions and hours. The initial annual burden was based on a lower number of contract actions which related to the fact that DHS was a new agency with consolidated acquisition procedures, processes, and policies. Although, there is an increase in the estimated burdened hours, there is no change in the information being collected.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Analysis

Agency: Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, DHS.

Title: Various Contract Related Forms That Will Be Included in the Homeland Security Acquisition Regulation.

OMB Number: 1600–0002.

Frequency: On Occasion.

Affected Public: Private sector.

Number of Respondents: 9537.

Estimated Time per Respondent: 1 hours.

Total Burden Hours: 9537.

Dated: April 16, 2014.

Margaret H. Graves,

Deputy Chief Information Officer.

[FR Doc. 2014–09012 Filed 4–18–14; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

Agency Information Collection Activities: Regulation on Agency Protests

AGENCY: Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, DHS.

ACTION: 60-Day Notice and request for comments; Extension without Change, 1600–0004.

SUMMARY: The Department of Homeland Security, Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Public Law 104–13, 44 U.S.C. Chapter 35).

DATES: Comments are encouraged and will be accepted until June 20, 2014. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Written comments and questions about this Information Collection Request should be forwarded to the Office of the Chief Procument Officer, Acquisition Policy and Legislation Office, DHS Attn.: Camara Francis, Department of Homeland Security, Office of the Chief Procurement Officer, Room 3114, Washington, DC 20528, *Camara.Francis@hq.dhs.gov*, 202–447–5904.

SUPPLEMENTARY INFORMATION: The Federal Acquisition Regulation (FAR); 48 CFR Chapter 1 provides general procedures on handling protests submitted by contractors to federal agencies. This regulation provides detailed guidance for contractors doing business with acquisition offices within the Department of Homeland Security (DHS) to implement the FAR. FAR Part 33.103, Protests, Disputes, and Appeals prescribe policies and procedures for filing protests and for processing contract disputes and appeals.

DHS will not be asking for anything outside of what is already required in the FAR. Should anything outside the FAR arise, DHS will submit a request for Office of Management and Budget (OMB) approval. The prior information collect request for OMB No. 1600–004 was approved through May 31, 2014 by OMB in a Notice of OMB Action.

The information being collected will be obtained from contractors as part of their submissions whenever they file a bid protest with the Department's Components. The information will be used by DHS officials in deciding how the protest should be resolved. Failure to collect this information would result in delayed resolution of agency protests.

According to Federal Procurement Data System (FPDS), the number of protest has increased each year over the past two years in annual respondent and burden hours. This increase in current protest activity is not the result of a deliberate program change, but from a new estimate of actions that are not controllable by the Federal government. Although, the number of protest has increased, there has not been any change in the information being collected.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Analysis

Agency: Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, DHS.

Title: Regulation on Agency Protests.

OMB Number: 1600–0004.

Frequency: Annually.

Affected Public: Private Sector.

Number of Respondents: 95.

Estimated Time per Respondent: 2 hours.

Total Burden Hours: 190.

Dated: April 16, 2014.

Margaret H. Graves,

Deputy Chief Information Officer.

[FR Doc. 2014–09011 Filed 4–18–14; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2014–0207]

Information Collection Request to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of an extension to the following collection of information: 1625–0073, Alteration of Unreasonably Obstructive Bridges. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before June 20, 2014.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2014–0207] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at Room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICR(s) are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (Cg–612), Attn Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE., Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents. Contact Ms. Cheryl Collins, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval of revisions of the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2014–0207], and must be received by June 20, 2014. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the "Privacy Act" paragraph below.

Submitting comments

If you submit a comment, please include the docket number [USCG–2014–0207], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type "USCG–2014–0207" in the "Search" box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a

stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Search" box insert "USCG–2014–0207" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Request

1. *Title:* Alternation of unreasonably Obstructive Bridges.

Omb Control Number: 1625–0073.

Summary: The collection of information is a request to determine if the bridge is unreasonably obstructive to navigation.

Need: 33 U.S.C. 494, 502, 511, 513, 514, 515, 516, 517, 521, 522, 523, and 524 authorize the Coast Guard to remove or alter the bridges and causeways that go over navigable waters of the United States and deemed to be unreasonably obstructive.

Forms: None.

Respondents: Public and private owners of bridges over navigable waters of the United States.

Frequency: On occasion.

Burden Estimate: The estimated burden remains unchanged at 240 hours a year due.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: April 14, 2014.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2014–08920 Filed 4–18–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R7–ES–2012–0019; FF07CAMM00–FXFR13370700000M7]

Marine Mammal Protection Act; Stock Assessment Reports

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of final reports; response to comments.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), we, the U.S. Fish and Wildlife Service (Service), announce that we have revised our stock assessment report (SAR) for the Pacific walrus (*Odobenus rosmarus divergens)* stock and for each of the following northern sea otter (*Enhydra lutris kenyoni*) stocks in Alaska: Southwest, Southcentral, and Southeast. We now make these four final revised SARs available to the public.

ADDRESSES: *Document Availability:* You may view the revised SARs at *http://www.regulations.gov* under Docket No. FWS–R7–ES–2012–0019. You may also view them in Adobe Acrobat format by navigating to the species information page at *http://alaska.fws.gov/fisheries/mmm/reports.htm.* Alternatively, you may contact the Chief, Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, MS–341, Anchorage, AK 99503; telephone: (907) 786–3800.

FOR FURTHER INFORMATION CONTACT: Charles S. Hamilton, Marine Mammals Management Office, (800) 362–5148 (telephone). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

Under the MMPA (16 U.S.C. 1361 *et seq.*) and its implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 18, we regulate the taking, possession, transportation, purchasing, selling, offering for sale, exporting, and importing of marine mammals. One of the goals of the MMPA is to ensure that stocks of marine mammals occurring in waters under U.S. jurisdiction do not experience a level of human-caused mortality and serious injury that is likely to cause the stock to be reduced below its *optimum sustainable population* (OSP) level. OSP is defined under the MMPA as "* * * the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element" (16 U.S.C. 1362(9)).

To help accomplish the goal of maintaining marine mammal stocks at their OSPs, section 117 of the MMPA requires the Service and the National Marine Fisheries Service (NMFS) to prepare a SAR for each marine mammal stock that occurs in waters under U.S. jurisdiction. Each SAR must include:

1. A description of the stock and its geographic range;

2. A minimum population estimate, maximum net productivity rate, and current population trend;

3. An estimate of human-caused mortality and serious injury;

4. A description of commercial fishery interactions;

5. A categorization of the status of the stock; and

6. An estimate of the *potential biological removal* (PBR) level.

The MMPA defines the PBR as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its OSP" (16 U.S.C. 1362(20)). The PBR is the product of the minimum population estimate of the stock (N_{min}); one half the maximum theoretical or estimated net productivity rate of the stock at a small population size (R_{max}); and a recovery factor (F_r) of between 0.1 and 1.0. This can be written as:

$$PBR = (N_{min})(\tfrac{1}{2} \text{ of the } R_{max})(F_r)$$

Section 117 of the MMPA requires the Service and NMFS to review the SARs: (a) At least annually for stocks that are specified as strategic stocks; (b) at least annually for stocks for which significant new information is available; and (c) at least once every 3 years for all other stocks. If our review of the status of a stock indicates that it has changed or may be more accurately determined, then the SAR must be revised accordingly.

A *strategic stock* is defined in the MMPA as a marine mammal stock "(a) for which the level of direct human-caused mortality exceeds the PBR level; (b) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) [the "ESA"], within the foreseeable future; or (c) which is listed as a threatened species or endangered species under the [ESA], or is designated as depleted under [the MMPA]" (16 U.S.C. 1362(19)).

The Pacific walrus SAR was last revised in December of 2009. In the final 2009 revised SAR, we classified the Pacific walrus as a strategic stock because the total human-caused mortality or removals exceeded PBR. Therefore, the Service has reviewed the stock assessment for the Pacific walrus annually and, in 2010, concluded that revision of the SAR was not warranted at that time because the status of the stock had not changed significantly and could not be more accurately determined. Stock assessment reports for the Southwest, Southcentral, and Southeast stocks of northern sea otters were last revised in August of 2008. The Southwest stock of northern sea otter qualifies as a strategic stock due to its listing as a threatened species under the ESA; therefore, the Service has reviewed the SAR for the Southwest stock annually and, in 2009 and 2010, concluded both times that revision of the SAR was not warranted because the status of the stock had not changed and could not be more accurately determined. Although the Southcentral and Southeast stocks of northern sea otter are considered non-strategic, the Service also reviewed these SARs in 2009 and 2010 due to the availability of significant new information. During both these reviews, the Service determined that revision of the SARs for the Southcentral and Southeast stocks of northern sea otter was not warranted. However, upon review of significant new information on all four stocks available in 2011, the Service determined that revisions was warranted for the Pacific walrus stock, as well as the Southwest, the Southcentral, and the Southeast northern sea otter stocks; the Service has consulted with the Alaska Regional Scientific Review Group concerning these revisions.

In an April 18, 2013 (78 FR 23284) **Federal Register** notice, we made our draft SARs available for the MMPA required 90-day public review and comment period. Following the close of the comment period, we revised the SARs based on public comments we received (see Response to Public Comments) and prepared the final revised SARs.

The following table summarizes the information we are now making available in the final revised SARs for the Pacific walrus and the Southwest, Southcentral and Southeast stocks of the northern sea otter, which lists the stocks' Nmin, Rmax, Fr, PBR, annual estimated human-caused mortality and serious injury, and status.

FINAL REVISED STOCK ASSESSMENT REPORTS FOR THE PACIFIC WALRUS, AND SOUTHWEST, SOUTHCENTRAL, AND SOUTHEAST STOCKS OF THE NORTHERN SEA OTTER

Stock	N_{min}	R_{max}	F_r	PBR	Annual estimated human-caused mortality and serious injury (5-year average)		Stock status
					Fishery/Other	Subsistence	
Pacific Walrus	129,000	0.08	0.5	2,580	21	4,852	Strategic.
Northern Sea Otter, Southwest Stock	45,064	0.20	0.1	450	<10	76	Strategic.
Northern Sea Otter, Southcentral Stock	14,661	0.20	1.0	1,466	1	293	Non-strategic.
Northern Sea Otter, Southeast Stock	21,798	0.20	1.0	2,179	Unknown	447	Non-strategic.

Response to Public Comments

We received five submissions on the draft SARs (78 FR 23284). Commenters included the Marine Mammal Commission (MMC), the North Slope Borough, nongovernmental organizations, and a concerned citizen. We present substantive issues raised in those comments that are pertinent to the SARs, along with our responses, below.

General Public Comments That Apply to All of the SARS

Comment 1: The Service has not demonstrated that it met the statutory requirement that stock assessments be reviewed at least annually for strategic stocks.

Our Response: As required by section 117(c)(1)(A) of the MMPA, the Service annually reviews existing SARs for those stocks that are specified as strategic. If this review indicates that the status of that stock has changed or can be more accurately determined, the Service revises the SAR in accordance with section 117(b); such revisions are subject to public notice in the **Federal Register** and public comment. However, if, based on the Service's review, the agency concludes that the status of the stock has not changed or cannot be more accurately determined and revision is not warranted, section 117(c) does not require public notice and comment on the results of that review. In view of this, we acknowledge the public may not be aware of the results of the Service's review of stock assessments. Therefore, although not required under the MMPA, in the future we will update our Web page at *http://alaska.fws.gov/fisheries/mmm/stock/stock.htm* to inform the public of the results of our review of stock assessments for Pacific walruses, the three stocks of northern sea otters, as well as polar bears (*Ursus maritimus).*

Comment 2: The Service should estimate total annual human-caused mortality and serious injury and provide a clear statement describing that estimate in every stock assessment report.

Our Response: Each of the SARs provides a section on annual human-caused mortality and serious injuries, which includes information the Service uses to make that estimate for each stock, as reported in the summary table above, i.e., Final Revised Stock Assessment Reports for the Pacific Walrus, and Southwest, Southcentral, and Southeast Stocks of the Northern Sea Otter. We base our estimate of annual human-caused mortalities and serious injuries on the best information that is available to us. The Service also estimates other factors that are suspected to be the cause of a decline or an impediment to recovery for strategic stocks.

Comment 3: The Service should collaborate with the NMFS to assess human effects more completely by: (1) Developing a framework for describing the full effects, both direct and indirect, of all human activities that may cause serious injury or mortality of marine mammals; and (2) incorporating that framework into stock assessment reports.

Our Response: The Service acknowledges the importance of collaboration and works with NMFS to the extent we are able in addressing management and conservation issues for marine mammal species. Although developing standardized frameworks can be helpful, the species managed by the two agencies have very diverse needs and often face different

challenges. For example, the types of human-caused mortalities with the most impact to sea otters in Alaska are unlike those with the most impact to cetaceans or even pinnipeds. Therefore, it is not always the best use of limited resources to invest in collaboration if the end result cannot be applied by both agencies. In addition, the resources available to the agencies are not always balanced in a particular area; each agency must prioritize its resources to address a myriad of challenges specific to that agency. Nonetheless, the Service will continue to work with NMFS to address general issues of similar nature.

Comment 4: The Service should include a statement about the status of each stock relative to its OSP in each of its stock assessment reports.

Our Response: Section 117(a)(5) of the MMPA directs the Service to categorize the status of the stock as one that either: (a) Has a level of human-caused mortality and serious injury that is not likely to cause the stock to be reduced below its OSP; or (b) is a strategic stock. The Pacific walrus is categorized as a strategic stock because the level of direct human-caused mortality exceeds the PBR. The Southwest northern sea otter stock is also categorized as a strategic stock due to its listing as a threatened species under the ESA. The Southcentral and Southeast stocks of northern sea otter are both considered non-strategic because the level of direct human-caused mortality and serious injury does not exceed the PBR in either stock nor is either near the level of human-caused mortality that would likely exceed PBR. In addition, although the Service does not currently know the OSP for these two stocks, based on the known population levels and our estimate of growth and considering the known level of human-caused mortality, we have determined that these stocks are increasing and that human-caused mortality and serious injury is not likely to cause the stocks to be reduced or to decrease their growth rates. Therefore, we would not expect the current level of human-caused mortality and serious injury to cause these stocks to be reduced below their plausible OSP. We have included this information in these two SARs

Comments on the Southeast Alaska Northern Sea Otter Stock

Comment 5: The data used in the SAR does not have adequate reference to published literature; therefore, the Service should assure publication of abundance estimates in formal and publically available literature.

Our Response: The Service uses the best scientific information available, which sometimes includes information that has not yet been published in the scientific literature. All literature, including unpublished reports, is available from the Service (or other office as identified) upon request.

Comment 6: The Service should work with the National Marine Fisheries Service (NMFS) to place observers on the unobserved gillnet fisheries and to attempt an estimation of entanglement rates in trap/pot gear.

Our Response: The Service recognizes that a fisheries observer program is a beneficial tool to quantify marine mammal and fisheries interactions. However, we note that current information indicates there are minimal impacts to sea otter populations from this fishery. In light of this and our limited resources, we have not pursued such a program for Service trust species.

Comment 7: There is no discussion of illegal harvest, though illegal hunting and trading have been prosecuted by the Service in a number of years; therefore, the Service should add to its SARs the annual number of animals that are known to have been illegally killed, whether by harvesters or unknown sources.

Our Response: The Service agrees, and information on illegal and unreported harvest has been added to the SARs. For example, between 2008 and 2012, a total of 145 sea otter pelts across all stocks were recovered by the Service's Law Enforcement Division for various violations of the MMPA. We have also added information about boat strikes.

Comment 8: The Service should revise its estimates of the minimum population estimate and potential biological removal (PBR) levels for sea otters using data only from surveys less than 8 years old, as recommended in the report entitled, "Revisions to Guidelines for Assessing Marine Mammal Stocks" (GAMMS II).

Our Response: While the Service was involved in the GAMMS workshops (NMFS 2005, Moore and Merrick 2011), the GAMMS guidelines are not currently considered Service policy. Consistent with MMPA Section 117, however, the Service uses the best scientific information available.

Comment 9: The Service should: (1) Develop strategic plans and conduct the surveys necessary to provide precise and accurate abundance estimates for all three Alaska sea otter stocks; and (2) use that information in its management of those stocks and assessments of risk factors affecting them.

Our Response: In 2005, the Service, the Alaska SeaLife Center, and the U.S. Geological Survey (USGS) developed a strategic plan to conduct sea otter surveys in Alaska ("A Population Monitoring Plan for Sea Otters in Alaska," July 1, 2005), which is available upon request. However, due to budgetary constraints the Service has been unable to fully implement the plan.

Comment 10: The Service should revise the distribution and stock boundary maps of each sea otter stock to provide more detailed, stock specific information, including the track lines of surveys conducted in the last 8 years.

Our Response: Inclusion of track lines from surveys is beyond the scope of the SARs. This information is available in other published and unpublished literature; it is also available from the Service on request.

Comment 11: The Service should review available information on stock structure of northern sea otters to determine if there are more than three sea otter stocks in Alaska.

Our Response: Subject to available funds, the Service plans to pursue genetics work to examine stock structure of northern sea otters. If the study is completed, the Service will evaluate the results and determine their application.

Comments on the Southcentral Alaska Stock

See Comments 5 and 11 for the *Southeast Alaska Northern Sea Otter Stock* above.

Comments on the Southwest Alaska Stock

Comment 12: There is apparently no finalized recovery plan in place despite publication of a draft in 2010.

Our Response: The Southwest Alaska Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*) Recovery Plan was finalized in August 2013 and is available on our Web site: *http://alaska.fws.gov/fisheries/mmm/seaotters/recovery.htm.*

Comment 13: Without new information, the Service has not adequately explained how it has reached its conclusion regarding the status of the stock and should therefore revise this language to provide a lesser degree of certitude regarding stock trends.

Our Response: The text in the SAR for the Southwest Alaska stock has been revised to better explain the source of the new information about trends in abundance for this stock and our conclusion that declining population trends have stabilized at low levels.

Comment 14: The Service's conclusion that the decline has halted and the growth rate has stabilized at

zero is not consistent with GAMMS guidelines that recommend estimates more than 8 years in age must be considered inaccurate and should be precautionarily reduced.

Our Response: The Service's conclusion that population trends have stabilized in the western Aleutian Islands over the last 5 to 8 years is based on the best scientific information available, which is available in the document "Southwest Alaska DPS of the Northern Sea Otter *(Enhydra lutris kenyoni)* 5-Year Review: Summary and Evaluation," available at: *http://alaska.fws.gov/fisheries/mmm/seaotters/recovery.htm.* In addition, as previously mentioned in response to comment 8, the GAMMS guidelines are not Service policy.

Comment 15: The Service should better address the potential for harvest to affect the overall trend in abundance of this stock, which is listed as threatened under the ESA.

Our Response: Harvest data for the Southwest Alaska stock of sea otters indicate that subsistence harvest continues to be variable and generally low. The current level of subsistence harvest is not excessive in relation to the population size, and the Service does not consider subsistence harvest to be a population-regulating factor. The Service recognizes that some sea otter harvest may not be reported, and that some unlawful take may have occurred and may occur in the future. However, the Service's Marking, Tagging, and Reporting Program (MTRP) provides the best information available on subsistence harvest levels.

Comment 16: There needs to be better tracking/monitoring of harvest levels.

Our Response: The Service's MTRP provides the best information available on harvest levels.

Comment 17: Actions by the Service to clarify the meaning of terms associated with the production of sea otter handicrafts, coupled with increased concerns on the part of commercial fisheries in southeast Alaska, will likely increase the harvest and may incentivize illegal take of otters in the adjacent and/or listed western stock.

Our Response: This issue is beyond the scope of these SARs.

Comments on the Pacific Walrus SAR

Comment 18: The Service should continue its efforts with the USGS to collaborate with Alaska Native communities to monitor the abundance and distribution of walruses, and to make full use of animals taken for subsistence and handicraft purposes to obtain data on demography, ecology, life history, behavior, health status, and other pertinent topics.

Our Response: Subject to available funds, we plan to continue these valuable efforts. The USGS and Alaska Natives are key partners in Pacific walrus management, conservation, and research. A good example of the effectiveness of our partnerships was the recently completed research cruise where the Service, USGS, and Alaska Department of Fish and Game (ADFG) were able to pool resources to initiate a population estimate study, conduct age and sex composition counts, and attach satellite tags to 34 animals. Two Alaska Native walrus hunters from Gambell and Savoonga were part of the sampling crew and their expertise in walrus behavior, navigating small boats in ice-covered seas, and weather patterns was instrumental in the success of that field effort.

Comment 19: The Service should work with the NMFS to generate a range-wide abundance estimate for Pacific walruses using data from the NMFS's recent and ongoing ice seal aerial surveys.

Our Response: We have had discussions with NMFS about the applicability of their ice seal surveys to estimate walrus abundance. The NMFS surveys were developed for ice seals, not walruses and would likely not provide a good estimate of walrus numbers due to use of different ice habitats by the species, differences in the distribution of walruses and the seals, and the arrangement of the transects. However, we plan to take a closer look at this data as it is available.

Comment 20: The Service should begin a status review under 16 U.S.C. 1383b(a) to determine whether the stock may warrant designation as "depleted," and whether rulemaking pursuant to 16 U.S.C. 1371b is warranted.

Our Response: Due to resource constraints, the Service does not intend to initiate an MMPA status review for the Pacific walrus at this time. In addition, the Service also notes that it annually evaluates the status of the species under the ESA through the Candidate Notice of Review Program. Pursuant to a court ordered settlement agreement, the Service is required to either issue a proposal for listing the Pacific walrus under the ESA or remove it as a candidate for listing by 2017. In the event that the Pacific walrus is listed as an endangered or threatened species, it would also be considered to be a depleted stock under the MMPA by virtue of the ESA listing.

Comment 21: The Service should revise its threats analysis for ocean acidification to include scientific studies showing that the Bering and Chukchi Seas are hotspots for ocean acidification, and that a dominant walrus prey group, bivalve mollusks, is one of the most sensitive marine taxa to the negative effects of ocean acidification.

Our Response: The Service recognizes ocean acidification as an emerging conservation issue. We considered studies showing potential impacts to bivalve mollusks in the Bering and Chukchi Seas. As we explained, walruses have the potential to switch to other prey items although we acknowledged that the general indications are that impacts appear more likely to be negative than positive or neutral (76 FR 7634; February 10, 2011). We will continue to monitor the potential impacts to Pacific walrus of ocean acidification in the future.

Comment 22: The Service should expand and update its analysis of the loss, thinning, and shorter duration of sea ice, which poses the primary threat to the Pacific walrus.

Our Response: In the SAR discussions concerning sea ice, we relied on a USGS ice modeling study specific to the Bering and Chukchi Seas (Douglas 2010) to assess this threat to the Pacific walrus. Since then, other modeling efforts (Kay et al. 2011, Maslowski et al. 2012, Overland and Wang 2013) suggest that ice loss could be more extensive and occur faster than the averages predicted by the USGS study, but those newer estimates are within the range of forecasts made in the USGS study. In addition, observations of ice loss are exceeding average model forecasts, but again are still within the range of model forecasts. Additionally, factors or threats that may or may not contribute to the species' risk of extinction are annually evaluated under the ESA through the Candidate Notice of Review Program/re-submitted petition process.

Comment 23: The Service should place more emphasis on the possible effects of climate change on walruses relative to subsistence hunting.

Our Response: Rather than address potential long term effects of various threats, SARs address current information on the current status of marine mammal stocks. Additional information about the potential long term effects of climate change on walruses is found in the 2011 ESA status review, the 2011 determination that listing the Pacific walrus as threatened or endangered on the ESA is warranted, and the subsequent annual candidate species reviews.

Comment 24: The Service should work with the USGS and co-management partners, including the

North Slope Borough, to quickly and appropriately develop a method for monitoring the population size and trend of Pacific walruses.

Our Response: We are currently working with USGS, the Eskimo Walrus Commission (EWC), Alaska Native walrus hunters, Russian Native walrus hunters, and Russian biologists to develop and test a genetic mark-recapture method to estimate Pacific walrus population size and trend.

Comment 25: The statement that the "lack of harvest quotas in the United States beginning in 1979 and reduced productivity levels resulted in another population decline and the population is once again limited primarily by subsistence harvest" does not fit with previous paragraphs where the Service states that information is lacking on population size and trend. The SAR should be changed or a reference added to support the idea that subsistence harvest, not other factors, is limiting walrus populations.

Our Response: We have modified this sentence in the SAR to indicate that the population is "likely" limited primarily by subsistence harvest, "although other factors such as haulout mortalities may also be important." Population trend and the prevalence of a limiting factor are not necessarily related; that is, a limiting factor may not be strong enough at any point in time to affect population trend. Population growth is nearly always limited by some factor even when the trend is positive and the population is increasing; populations rarely grow at their maximum rate due to accidents, disease, harvest, etc. Given that harvests are over 4,000 animals range-wide annually, observed fisheries mortalities in the United States are 0–3 animals per year, observed carcasses on the beach or in the water in the United States number fewer than 100 per year, evidence of disease and contaminants is rare, and coastal haulout mortalities range wide have declined to fewer than 1,000 per year after 2007, it is reasonable to conclude that the subsistence harvest is the primary limiting factor.

Comment 26: One commenter questioned whether the Service's proposed genetic mark-recapture approach was the best approach for obtaining information on population status and trends.

Our Response: This issue is beyond the scope of the SAR.

Comment 27: One commenter questioned the Service's position that subsistence harvest limited the walrus population in light of the fact that harvest levels since 2006 are 5 to 68 percent lower than this long-term average.

Our Response: Trends in harvest numbers are not indicative of whether the harvest is a primary limiting factor or not. See our response to comment 25.

Comment 28: The Service adjusts harvest estimates by 42 percent to account for struck and lost animals. It is not clear, however, how the Service deals with walruses that are struck and lost and later retrieved; for example, hunters who find a carcass and remove the head but, do not salvage any meat because it is spoiled, would most likely have the tusks marked.

Our Response: The 42 percent struck and lost correction is applied only to animals that are identified as those harvested, not beach cast or otherwise recovered dead walruses. Therefore, such corrections are not included for tusks obtained from beach cast animals.

Comment 29: The caption for the harvest table mentions that levels are adjusted for unreported walruses using a mark-recapture method. One commenter requested additional information about the method.

Our Response: In general, tusks are given a unique mark by the Service when hunters return to the beach from a hunting trip and that mark is accounted for and removed when the tusks are subsequently submitted to the Service for permanent tagging by the hunter. The Service then compares the number of unique marks placed on tusks with the number of those marks "recaptured" when the tusks are permanently tagged. The tusk mark-recapture project is limited to the Native Villages of Gambell and Savoonga. The adjustment is for the U.S. harvest only, as Russia does not have a tusk tagging requirement. Further details on how harvest levels are estimated can be found in the 2011 status review.

Comment 30: One commenter asked how the Service proposes to use population numbers or trends in order to reduce the harvest without information about population size or trend.

Our Response: The Service is exploring new methods to obtain accurate information on walrus population numbers and trends. In the interim, there are a number of population indicators such as calf to cow ratios, age/sex composition counts, estimates of body condition, observations of Alaska Native hunters, expert opinion, Aerial Surveys of Arctic Marine Mammals results, haulout counts, and population modeling, to make an assessment of population status. We believe that such a weight of evidence approach in consultation and collaboration with our co-managers will provide information useful in making harvest prescriptions, if needed.

Comment 31: One commenter pointed out that, although the SARs state that several fisheries overlap with walrus distribution and, therefore, could interact with walruses, we provide information for only one fishery. Additional information is needed about the other fisheries that could interact with walruses and to support the implied conclusion that only one fishery may be a problem for walruses.

Our Response: For Federal waters, the Service receives information on interactions between fisheries and marine mammals from NMFS on an annual basis. That information includes all the fisheries within the range of the Pacific walrus in Federal waters. The fishery listed in the SAR is the only one that has ever reported walrus interactions. However, as noted, observer coverage varies with the fishery; the budget for the observer program is such that coverage has to be rotated among the various Federal fisheries. There may be fisheries in State waters that could interact with walruses, but we are not aware of any issues. Observer coverage is not required for salmon and herring fisheries; while observer coverage is 100 percent for State-managed shellfish and scallop fisheries, no interactions with walruses have been observed.

Comment 32: One commenter points out an apparent contradiction between the statements that no mortalities or serious injuries were directly associated with research activities and a subsequent statement that one calf died during the research activities.

Our Response: Information about research-related mortality was updated in the final SAR as it became available. The sentence that there were no mortalities referred to the research activities of affixing satellite transmitters and collecting skin and blubber samples, while the subsequent sentence referred to a calf mortality that occurred when a boat ferrying researchers passed by a walrus haulout.

Comment 33: One commenter suggested that we include information about captured orphaned walruses in the United States.

Our Response: We agree; the SAR has been updated to reflect the recovery of stranded animals.

Comment 34: One commenter asked for additional information about mortality estimates at haulouts, and questioned why the mortality estimates were not specific (i.e., 187 versus less than 200).

Our Response: The mortality estimates at haulouts provided in the SAR are rough estimates because they are based on a combination of biologist and Alaska Native hunter's observations and counts. We have provided clarifying text to the SAR to reflect the source and nature of this information.

Comment 35: One commenter suggested that the SAR be modified to reflect the level of industrial activity near Hanna Shoal.

Our Response: From 2006 to 2013, two to three operators have conducted activities in the Chukchi Sea annually, but not always near Hanna Shoal. Activities have included mainly geotechnical and environmental studies, but also 2D and 3D seismic activities, and one drilling operation. We anticipate that the level of activity in the foreseeable future near Hanna Shoal will remain the same as that which we have seen in the past 8 years.

Comment 36: One commenter recommended that the Service update information about the amount of tonnage of cargo, including oil products, moving through Russian waters, as the traffic there far exceeds that in U.S. waters.

Our Response: The information presented was the most current on the number of transits at the time the draft SAR was completed. We currently do not have information on the tonnage of cargo moving through Russian and U.S. waters, but will seek a source for this type of information in the future.

References

In accordance with section 117(b)(1) of the MMPA, we include in this notice a list of the sources of information or published reports upon which we based the revised SARs. The Service consulted technical reports, conference proceedings, refereed journal publications, and scientific studies prepared or issued by Federal agencies, nongovernmental organizations, and individuals with expertise in the fields of marine mammal biology and ecology, population dynamics, Alaska Native subsistence use of marine mammals, modeling, and commercial fishing technology and practices.

These agencies and organizations include: the Service, the U.S. Geological Survey, the National Oceanic and Atmospheric Administration, the National Park Service, the Arctic Institute, the North American Wildlife and Natural Resource Conference, the Marine Mammals of the Holarctic V Conference, the Aleutian Islands Risk Assessment Management Team, the *Exxon Valdez* Restoration Project, and the Outer Continental Shelf Environmental Assessment Program. In addition, the Service consulted publications such as the Journal of Wildlife Management, Conservation Biology, Marine Mammal Science, Ecological Applications, Biological Conservation, Aquatic Mammals, and Journal of Zoology, as well as other refereed journal literature, technical reports, and data sources in the development of these SARs.

A complete list of citations to the scientific literature relied on for each of the four revised SARs is available on the Federal eRulemaking portal (*http://www.regulations.gov*) under Docket No. FWS–R7–ES–2012–0019. The list can also be viewed in Adobe Acrobat format at *http://alaska.fws.gov/fisheries/mmm/reports.htm.*

Authority

The authority for this action is the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

Dated: April 7, 2014.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

[FR Doc. 2014–08942 Filed 4–18–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNMF01000 L13110000.PP0000 14XL1109PF]

Notice of Public Meeting, Farmington District Resource Advisory Council Meeting, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the Bureau of Land Management's (BLM) Farmington District Resource Advisory Council (RAC) will meet as indicated below.

DATES: The RAC will meet on May 28, 2014, at the Taos Field Office, 226 Cruz Alta Road, Taos New Mexico from 9 a.m.–4 p.m. On May 29, 2014, there will be a field trip in Taos, New Mexico, from 8:30 a.m. to 4:30 p.m.; it is open to the public. The RAC will meet at 8:15 a.m. on May 29, 2014, at the Taos Field Office, 226 Cruz Alta Road. The BLM will not provide transportation for the field trip. The public may send written comments to the RAC at the BLM Farmington District Office, 6251 College Blvd., Suite A, Farmington, New Mexico 87402.

FOR FURTHER INFORMATION CONTACT: Christine Horton, BLM Farmington District Office, 6251 College Blvd., Suite A, Farmington, NM 87402, 505–564–7633. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8229 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 10-member Farmington District RAC advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in the BLM's Farmington District. Planned agenda items include: Opening remarks from the BLM Farmington District Manager; updates on ongoing planning efforts in the Farmington Field Office; an update on the Mancos/Gallup Shale Resource Management Plan Amendment; the RAC's recommendations on the wild horse and burro management plan; and Taos Field Office planning updates (including the Río Grande del Norte National Monument Management Plan).

On Wednesday, May 28, 2014, at 3 p.m., members of the public will have the opportunity to make comments to the RAC, during a half hour public comment period. All RAC meetings are open to the public. Persons wishing to make comments during the public comment period should register in person with the BLM by 2 p.m. on May 28, 2014, at the meeting location. Depending on the number of commenters, the length of comments may be limited; this time may vary. The BLM appreciates all comments.

Michael H. Tupper,

Deputy State Director, Lands and Resources.

[FR Doc. 2014–08981 Filed 4–18–14; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Application for Alien Employment Certification

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA)

sponsored information collection request (ICR) revision titled, "Application for Alien Employment Certification," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before May 21, 2014.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201312-1205-0006* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202 395–6881 (this is not a toll free number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks OMB approval under the PRA for revisions to the Application for Alien Employment Certification information collection that helps the DOL to meet its statutory responsibilities for program administration, management, and oversight under the Immigration and Naturalization Act (INA). INA section 212(a)(5)(A)(iii) deals specifically with professional athletes coming to the U.S.A. on a permanent basis as immigrants, and Form ETA–750, part A is used to collect information that permits the DOL to meet Federal responsibilities for such entry. Form ETA–750, part B provides detailed information about an alien's education and work history and is used by the DOL to collect information about the professional athlete on whose behalf an application for permanent labor certification is filed. The Department of Homeland Security also uses part B for foreign workers applying for the National Interest Waiver of the job offer requirement under INA section 203(b)(2)(B)(i). This use is required under is also required 8 CFR 204.5(k)(4)(ii).

This information collection has been classified as a revision, because Form ETA–9142B is now used to obtain information needed to issue an H–2B visa to a professional athlete seeking temporary non-immigrant admission into the U.S.A. The DOL has previously used Form ETA–750 part A to collect information for labor certification for athletes seeking either temporary or permanent admission. The DOL obtains PRA authority for Form ETA–9142B under Control Number 1205–0509, and this ICR will merely conclude the transfer of the burden from one Control Number to another.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0015. The current approval is scheduled to expire on April 30, 2014; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 3, 2014 (79 FR 407).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the ADDRESSES section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0015. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Application for Alien Employment Certification.

OMB Control Number: 1205–0015.

Affected Public: Private Sector businesses or other for profits and not for profit institutions.

Total Estimated Number of Respondents: 2,033.

Total Estimated Number of Responses: 2,033.

Total Estimated Annual Time Burden: 3,692 hours.

Total Estimated Annual Other Costs Burden: $0.

Dated: April 15, 2014.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2014–08997 Filed 4–18–14; 8:45 am]

BILLING CODE 4510–FP–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (14–036)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction

Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for NASA.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Ms. Frances Teel, NASA PRA Clearance Officer, NASA Headquarters, 300 E Street SW., Mail Code JF000, Washington, DC 20546. *Frances.C.Teel@nasa.gov*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Aeronautics and Space Administration (NASA) is reinstating an existing information collection that is used to ensure the proper disposition of rights to inventions made in the course of NASA-funded research. Through this information collection, NASA tracks applicable inventions disclosed by its grant recipients. NASA is seeking to reinstate this information collection with the following changes: (1) Title change from *Patents-Grants and Cooperative Agreements* to *Report of Inventions-Grants with Educational and Non-Profit Entities,* and *(2)* an increase in the estimated number of respondents. This **Federal Register** notice also includes the total estimated annual cost burden to respondents or record keepers resulting from the collection of this information.

II. Method of Collection

NASA utilizes paper and electronic methods to collect information from grant recipients.

III. Data

Title: Report of Inventions-Grants with Educational and Non-Profit Entities.

OMB Number: 2700–0048.

Type of review: Reinstatement of a Previously Approved Information Collection with Change.

Affected Public: Not-for-profit institutions; Business or other for-profit; State, Local, or Tribal Government.

Estimated Number of Respondents: 6,606.

Estimated Time per Response: Variable.

Estimated Total Annual Burden Hours: 11,889.

Estimated Total Annual Cost: $391,148.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and 4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2014–08921 Filed 4–18–14; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Office of the Federal Register

Selected Agreements and Other Instruments as of December 31, 2013, Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States

AGENCY: Office of the Federal Register, NARA.

ACTION: Notice of availability of agreements.

SUMMARY: The American Institute in Taiwan has concluded a number of selected agreements and other instruments with the Taipei Economic and Cultural Representative Office in the United States (formerly the Coordination Council for North American Affairs) in order to maintain cultural, commercial and other unofficial relations between the American people and the people of Taiwan. The Director of the Federal Register is publishing the list of these agreements on behalf of the American Institute in Taiwan in the public interest.

SUPPLEMENTARY INFORMATION: Cultural, commercial and other unofficial relations between the American people and the people of Taiwan are maintained on a non-governmental basis through the American Institute in Taiwan (AIT), a private nonprofit corporation created under the Taiwan Relations Act (Pub. L. 96–8; 93 Stat. 14). The Coordination Council for North American Affairs (CCNAA) was established as the nongovernmental Taiwan counterpart to AIT. On October 10, 1995, the CCNAA was renamed the Taipei Economic and Cultural Representative Office in the United States (TECRO).

Under section 12 of the Act, agreements concluded between AIT and TECRO (CCNAA) are transmitted to the Congress, and according to sections 6 and 10(a) of the Act, such agreements have full force and effect under the law of the United States. The texts of the selected agreements and other instruments are available from the American Institute in Taiwan, 1700 North Moore Street, Suite 1700, Arlington, Virginia 22209. For further information, please telephone (703) 525–8474, or fax (703) 841–1385.

Following is a list of selected agreements and other instruments between AIT and TECRO (CCNAA) as of December 31, 2013.

Dated: April 14, 2014.

For the American Institute in Taiwan.

Joseph R. Donovan Jr.,

Managing Director.

Dated: April 16, 2014.

For the Office of the Federal Register.

Charles Barth,

Director.

Selected Agreements and Other Instruments Between American Institute in Taiwan (AIT) and the Taipei Economic and Cultural Representative Office in the United States (TECRO) as of December 31, 2013

Status of TECRO

The Exchange of Letters concerning the change in the name of the Coordination Council for North American Affairs (CCNAA) to the Taipei Economic and Cultural Representative Office in the United States (TECRO). Signed December 27, 1994 and January 3, 1995. Entered into force January 3, 1995.

Agriculture

1. Guidelines for a cooperative program in the agriculture sciences. Signed January 28, 1986. Entered into force January 28, 1986.

2. Amendment amending the 1986 Guidelines for a Cooperative Program in the Agricultural Sciences. Effected by exchange of letters September 11, 1989. Entered into force September 11, 1989.

3. Cooperative service agreement to facilitate fruit and vegetable inspection through their designated representatives, the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) and the Taiwan Provincial Fruit Marketing Cooperative (TPFMC) supervised by the Taiwan Council of Agriculture (COA). Signed April 28, 1993. Entered into force April 28, 1993.

4. Memorandum of agreement concerning sanitary/phytosanitary and agricultural standards. Signed November 4, 1993. Entered into force November 4, 1993.

5. Agreement amending the guidelines for the cooperative program in agricultural sciences. Signed October 30, 2001. Entered into force October 30, 2001.

6. Memorandum of Understanding Establishing Consultative Committee on Agriculture Terms of Reference. Signed July 10, 2007. Entered into force July 10, 2007.

7. Consultative Committee on Agriculture Terms of Reference. Signed July 10, 2007. Entered into force July 10, 2007.

8. Notification on Protocol of Bovine Spongiform Encephalopathy (BSE)—related measures for the importation of beef and beef products for human consumption from territory of the authorities represented by AIT. Signed October 22, 2009. Entered into force October 22, 2009.

Aviation

1. Memorandum of agreement concerning the arrangement for certain aeronautical equipment and services relating to civil aviation (NAT–I–845), with annexes. Signed September 24 and October 23, 1981. Entered into force October 23, 1981.

2. Amendment amending the memorandum of agreement concerning aeronautical equipment and services of September 24 and October 23, 1981. Signed September 1 and 23, 1985. Entered into force September 3, 1985.

3. Agreement amending the memorandum of agreement of September 24 and October 23, 1981, concerning aeronautical equipment and services. Signed September 23 and October 17, 1991. Entered into force October 17, 1991.

4. Air transport agreement, with annexes. Signed at Washington March 18, 1998. Entered into force March 18, 1998.

5. Agreement for promotion of aviation safety. Signed June 30, 2003. Entered into force June 30, 2003.

6. Exchange of Letters concerning removal from the agreement of provisions relating to regulations of computer reservation systems in Annex III to the Air Transport Agreement signed March 18, 1998. Signed December 11, 2006 and January 2, 2007. Entered into force January 2, 2007.

7. Exchange of Letters on Principles for Cooperation on Improving Travel Security. Signed December 19, 2008. Enter into force December 19, 2008.

8. Agreement for Cooperation in and the promotion of Transportation of Safety. Signed June 15, 2010 and June 22, 2010. Entered into force June 22, 2010.

9. Memorandum of Agreement NAT I–2305 between AIT and TECRO. Signed May 16, 2012 and February 21, 2012. Entered into force May 16, 2012.

Conservation

1. Memorandum on cooperation in forestry and natural resources conservation. Signed May 23 and July 4, 1991. Entered into force July 4, 1991.

2. Memorandum on cooperation in soil and water conservation under the guidelines for a cooperative program in the agricultural sciences. Signed at Washington October 5, 1992. Entered into force October 5, 1992.

3. Agreement on technical cooperation in forest management and nature conservation. Signed October 24, 2003 and February 27, 2004. Entered into force February 27, 2004.

4. Memorandum of Understanding Concerning Cooperation in Fisheries and Aquaculture. Signed April 21, 2008. Entered into force April 21, 2008.

5. Memorandum of Understanding Concerning Cooperation in Fisheries and Aquaculture. Signed June 18, 2013 and June 6, 2013. Entered into force June 18, 2013.

Consular

1. Agreement regarding passport validity. Effected by exchange of letters of August 26 and November 13, 1998. Entered into force December 10, 1998.

Consumer Product Safety

1. Memorandum of Understanding for cooperation associated with consumer product safety matters. Signed April 29 and July 27, 2004. Entered into force July 27, 2004.

Customs

1. Agreement for technical assistance in customs operations and management, with attachment. Signed May 14 and June 4, 1991. Entered into force June 4, 1991.

2. Agreement on TECRO/AIT carnet for the temporary admission of goods. Signed June 25, 1996. Entered into force June 25, 1996.

3. Agreement regarding mutual assistance between their designated representatives, the United States Customs Administration and the Taiwan Customs Administration. Signed January 17, 2001. Entered into force January 17, 2001.

Drug Enforcement

1. Memorandum of Understanding Concerning the Sharing of Information in Relation to Preventing Combating Breach of Customs and Controlled Substances Laws. Signed February 10, 2009. Entered into force February 10, 2009.

Education and Culture

1. Agreement amending the agreement for financing certain educational and cultural exchange programs of April 23, 1964. Effected by exchange of letters at Taipei April 14 and June 4, 1979. Entered into force June 4, 1979.

2. Agreement concerning the Taipei American School, with annex. Signed at Taipei February 3, 1983. Entered into force February 3, 1983.

3. Memorandum of Understanding on Educational Cooperation. Signed at Washington DC December 5, 2008. Entered into force December 5, 2008.

4. Exchange of letters concerning the Foundation for Scholarly Exchange pursuant to the Agreement for financing certain educational and cultural exchange programs. Signed December 4, 2009 and April 15, 2010. Entered into force April 15, 2010.

Energy

1. Agreement relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed at Taipei October 3, 1984. Entered into force October 3, 1984.

2. Agreement amending and extending the agreement of October 3, 1984, relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed October 19, 1989. Entered into force October 19, 1989.

3. Agreement abandoning in place in Taiwan the Argonaut Research Reactor loaned to National Tsing Hua University. Signed November 28, 1990.

4. Agreement Amending and Extending the Agreement of October 3, 1984, as amended and extended, relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed October 3, 1994. Entered into force October 3, 1994.

5. Agreement concerning safeguards arrangements for nuclear materials transferred from France to Taiwan. Effected by exchange of letters February

12 and May 13, 1993. Entered into force May 13, 1993.

6. Memorandum of Agreement for release of an Energy and Power Evaluation Program (ENPEP) computer software package. Signed January 25 and February 27, 1995. Entered into force February 27, 1995.

7. Agreement regarding terms and conditions for the acceptance of foreign research reactor spent nuclear fuel at the Department of Energy's Savannah River site. Signed December 28, 1998 and February 25, 1999. Entered into force February 25, 1999.

8. Agreement for technical cooperation in clean coal and advanced power systems technologies. Signed October 31, 2003 and January 20, 2004. Entered into force January 20, 2004.

9. Modification Number 1 to the Agreement for the Shipment of Spent Nuclear Fuel. Signed July 8, 2009. Entered into force July 8, 2009.

10. Arrangement for the Exchange of Technical Information and Cooperation in Nuclear Regulatory and Safety Matters. Signed January 4, 2011 and January 4, 2011. Entered into force January 4, 2011.

11. Statement of Intent regarding Nuclear and Radiological Incident Response and Emergency Management Capabilities. Signed May 9, 2011 and May 26, 2011. Entered into force May 26, 2011.

12. Joint Determination of Safeguardability for Alteration in Form or Content of Irradiated Fuel elements. Signed June 20, 2011 and June 20, 2011. Entered into force June 20, 2011.

13. Agreement for Technical Cooperation in Atmospheric Monitoring, Clean Energy, and Environmental Science. Signed July 16, 2013 and July 16, 2013. Entered into force July 16, 2013.

Environment

1. Agreement for technical cooperation in the field of environmental protection, with implementing arrangement. Signed June 21, 1993. Entered into force June 21, 1993.

2. Agreement extending the agreement of June 21, 1993 for technical cooperation in the field of environmental protection. Effected by exchanges of letters June 30 and July 20 and 30, 1998. Entered into force July 30, 1998, effective June 21, 1998.

3. Agreement extending the agreement for technical cooperation in the field of environmental protection. Signed September 23, 2003. Entered into force September 23, 2003.

4. Extension of Agreement for the Technical Cooperation in the Field of Environmental Protection. Signed September 29, 2008. Entered into force September 29, 2008.

5. Letter of confirmation of compatible Good Laboratory Practices programs. Signed January 19, 2010 and February 3, 2010. Entered into force February 3, 2010.

6. Extension of Agreement for the Technical Cooperation in the Field of Environmental Protection. Signed July 16, 2013 and July 16, 2013. Entered into force July 16, 2013.

Health

1. Guidelines for a cooperative program in the biomedical sciences. Signed May 21, 1984. Entered into force May 21, 1984.

2. Guidelines for a cooperative program in food hygiene. Signed January 15 and 28, 1985. Entered into force January 28, 1985.

3. Agreement amending the 1984 guidelines for a cooperative program in the biomedical sciences, with attachment. Signed April 20, 1989. Entered into force April 20, 1989.

4. Agreement amending the 1984 guidelines for a cooperative program in the biomedical Sciences, as amended, with attachment. Signed August 24, 1989. Entered into force August 24, 1989.

5. Guidelines for a cooperative program in public health and preventive medicine. Signed at Arlington and Washington June 30 and July 19, 1994. Entered into force July 19, 1994.

6. Agreement for technical cooperation in vaccine and immunization-related activities, with implementing arrangement. Signed at Washington October 6 and 7, 1994. Entered into force October 7, 1994.

7. Agreement regarding the mutual exchange of information on medical devices, including quality systems requirements inspectional information. Effected by exchange of letters January 9, 1998. Entered into force January 9, 1998.

8. Memorandum of Understanding regarding Scientific Exchange Activities. Signed September 3, 2013 and September 3, 2013. Entered into force September 3, 2013.

Homeland Security

1. Declaration of Principles for governing cooperation, on the basis of reciprocity, including the posting of AIT Representatives at the Port of Kaohsiung, and the posting of TECRO Representatives at certain U.S. seaports. Signed August 18, 2004. Entered into force August 18, 2004.

2. Memorandum of understanding concerning cooperation to prevent the illicit trafficking in nuclear and other radioactive material. Signed May 25, 2006. Entered into force May 25, 2006.

3. Declaration of Principles for governing cooperation, on the basis of reciprocity, including the posting of AIT Representatives at seaports in Taiwan. Signed September 22, 2006. Entered into force September 22, 2006.

4. Exchange of Letters to facilitate the implementation of the MOU concerning cooperation to prevent the illicit trafficking in nuclear and other radioactive material signed May 25, 2006. Signed April 30, 2007 and July 5, 2007. Entered into force July 5, 2007.

5. Port Air Quality Partnership Declaration on the occasion of a Port Air Quality Partnership Conference hosted by their designated representatives, the Port of Tacoma, Washington and the Harbor Bureaus of Kaosiung, Taipei and Keelung on November 18–20, 2008. Signed November 20, 2008. Enter into force November 20, 2008.

6. Agreement for Transfer of Ownership. Signed September 30, 2009. Entered into force September 30, 2009.

7. Joint Statement between AIT and TECRO for Cooperation on Repatriation of Persons Bearing Taiwan Passports. Signed September 25, 2012. Entered into force September 25, 2012.

8. Arrangement between AIT and TECRO Regarding Mutual Recognition of the Supply Chain Security Programs of their Designated Representatives: U.S. DHS through U.S. Customs and Border Protection and Directorate General of Customs Taiwan Ministry of Finance. Signed November 26, 2012. Entered into force November 26, 2012.

Intellectual Property

1. Agreement concerning the protection and enforcement of rights in audiovisual works. Effected by exchange of letters at Arlington and Washington June 6 and 27, 1989. Entered into force June 27, 1989.

2. Understanding concerning the protection of intellectual property rights. Signed at Washington June 5, 1992. Entered into force June 5, 1992.

3. Agreement for the protection of copyrights, with appendix. Signed July 16, 1993. Entered into force July 16, 1993.

4. Memorandum of understanding regarding the extension of priority filing rights for patent and trademark applications. Signed April 10, 1996. Entered into force April 10, 1996.

Judicial Assistance

1. Memorandum of understanding on cooperation in the field of criminal investigations and prosecutions. Signed

at Taipei October 5, 1992. Entered into force October 5, 1992.

2. Agreement on mutual legal assistance in criminal matters. Signed March 26, 2002. Entered into force March 26, 2002.

Labor

1. Guidelines for a cooperative program in labor affairs. Signed December 6, 1991. Entered into force December 6, 1991.

2. Agreement for a cooperative program in Labor Mediation and Alternative Dispute Resolution. Signed June 23, 2010 and July 7, 2010. Entered into force July 7, 2010.

Mapping

1. Agreement concerning mapping, charting, and geodesy cooperation. Signed November 28, 1995. Entered into force November 28, 1995.

2. Amendment one to the Agreement concerning mapping, charting, and geodesy cooperation. Signed December 1, 2009. Entered into force December 1, 2009.

Maritime

1. Agreement concerning mutual implementation of the 1974 Convention for the safety of life at sea. Effected by exchange of letters at Arlington and Washington August 17 and September 7, 1982. Entered into force September 7, 1982.

2. Agreement concerning mutual implementation of the 1969 international convention on tonnage measurement. Effected by exchange of letters at Arlington and Washington May 13 and 26, 1983. Entered into force May 26, 1983.

3. Agreement concerning mutual implementation of the protocol of 1978 relating to the 1974 international convention for the safety of life at sea. Effected by exchange of letters at Arlington and Washington January 22 and 31, 1985. Entered into force January 31, 1985.

4. Agreement concerning mutual implementation of the protocol of 1978 relating to the international convention for the prevention of pollution from ships, 1973. Effected by exchange of letters at Arlington and Washington January 22 and 31, 1985. Entered into force January 31, 1985.

5. Agreement concerning mutual implementation of the 1966 international convention on load lines. Effected by exchange of letters at Arlington and Washington March 26 and April 10, 1985. Entered into force April 10, 1985.

6. Agreement concerning the operating environment for ocean carriers. Effected by exchange of letters at Washington and Arlington October 25 and 27, 1989. Entered into force October 27, 1989.

Military

1. Agreement for foreign military sales financing by the authorities on Taiwan. Signed January 4 and July 12, 1999. Entered into force July 12, 1999.

2. Letter of Agreement concerning exchange of research and development information. Signed August 4, 2004. Entered into force August 4, 2004.

3. Master Information Exchange Agreement Information Exchange Annex AF–05–TW–9301 concerning Nanoscience and Nanotechnology. Signed December 15, 2005. Entered into force December 15, 2005.

4. Information and communication technologies (ICT) forum terms of reference. Signed October 31, 2007. Entered into force October 31, 2007.

5. Memorandum of Agreement Concerning Research, Development, Test and Evaluation (RDT&E) Projects. Signed May 14, 2008. Entered into force May 14, 2008.

6. Arrangement Concerning the Exchange of Aeronautical Information. Signed January 27, 2009. Entered into force January 27, 2009.

7. Information Exchange Annex N–11–TW–6551 Master Information Exchange Letter of Agreement. Signed May 25, 2011. Entered into force May 25, 2011.

8. Information Exchange Annex N–12–TW–6550 Master Information Exchange Letter of Agreement between AIT and TECRO concerning Meteorological and Oceanographic Information and Techniques. Singed January 31, 2012. Entered into force January 31, 2012.

Postal

1. Agreement concerning establishment of INTELPOST service. Effected by exchange of letters at Arlington and Washington April 19 and November 26, 1990. Entered into force November 26, 1990.

2. International business reply service agreement, with detailed regulations. Signed February 7, 1992. Entered into force February 7, 1992.

3. Agreement on the application of an EMS (express mail service) pay-for-performance plan. Signed March 5, 2004 and August 25, 2004. Entered into force January 1, 2005.

Privileges and Immunities

1. Agreement on privileges, exemptions and immunities, with addendum. Signed at Washington October 2, Entered into force October 2, 1980.

2. Agreement governing the use and disposal of vehicles imported by the American Institute in Taiwan and its personnel. Signed at Taipei April 21, 1986. Entered into force April 21, 1986.

3. Agreement on Privileges, Exemptions, and Immunities. Signed February 4, 2013 and February 4, 2013. Entered into force February 4, 2013.

Scientific & Technical Cooperation

1. Agreement on scientific cooperation. Effected by exchange of letters at Arlington and Washington on September 4, 1980. Entered into force September 4, 1980.

2. Agreement concerning renewal and extension of the 1980 agreement on scientific cooperation. Signed March 10, 1987. Entered into force March 10, 1987.

3. Guidelines for a cooperative program in atmospheric research. Signed May 4, 1987. Entered into force May 4, 1987.

4. Agreement for technical assistance in dam design and construction, with appendices. Signed August 24, 1987. Entered into force August 24, 1987.

5. Agreement for a cooperative program in the sale and exchange of technical, scientific, and engineering information. Signed November 17, 1987. Entered into force November 17, 1987.

6. Agreement extending the agreement of November 17, 1987, for a cooperative program in the sale and exchange of technical, scientific and engineering information. Signed August 8, 1990. Entered into force August 8, 1990.

7. Cooperative program on Hualien soil-structure interaction experiment. Signed September 28, 1990. Entered into force September 28, 1990.

8. Agreement for technical cooperation in geodetic research and use of advanced geodetic technology, with implementing arrangement. Signed January 11 and February 21, 1991. Entered into force February 21, 1991.

9. Agreement amending and extending the agreement of August 24, 1987, for technical assistance in dam design and construction. *Name changed to Agreement for Technical Assistance in Areas of Water Resource Development. Signed May 11 and June 9, 1992. Entered into force June 9, 1992.

10. Agreement for technical cooperation in seismology and earthquake monitoring systems development, with implementing arrangement. Signed July 22 and 24, 1992. Entered into force July 24, 1992.

11. Agreement amending the Agreement of August 24, 1987 for technical assistance in areas of water resource development. Signed August 30 and September 3, 1996. Entered into force September 3, 1996.

12. Agreement concerning joint studies on reservoir sedimentation and sluicing, including computer modeling. Signed February 14 and March 8, 1996. Entered into force March 8, 1996.

13. Guidelines for a cooperative program in physical sciences. Signed January 2 and 10, 1997. Entered into force January 10, 1997.

14. Agreement for scientific and technical cooperation in ocean climate research. Signed February 18, 1997. Entered into force February 18, 1997.

15. Agreement amending the agreement of August 24, 1987 for technical assistance in areas of water resource development. Signed October 14, 1997. Entered into force October 14, 1997.

16. Agreement for technical cooperation in scientific and weather technology systems support. Signed October 22 and November 5, 1997. Entered into force November 5, 1997.

17. Agreement for technical cooperation associated with establishment of advanced operational aviation weather systems. Signed February 10 and 13, 1998. Entered into force February 13, 1998.

18. Agreement for technical cooperation associated with development, launch and operation of a constellation observing system for meteorology, ionosphere and climate. Signed May 29 and June 30, 1999. Entered into force June 30, 1999.

19. Agreement for technical cooperation associated with establishment of advanced data assimilation and modeling systems. Signed December 20, 2004 and January 12, 2005. Entered into force January 12, 2005.

20. Agreement for cooperation in the micro pulse lidar network and the aerosol robotic network. Signed July 13, 2007 and April 17, 2007. Entered into force July 13, 2007.

21. Agreement for technical cooperation in meteorology and forecast systems development. Signed September 5, 2007 and June 25, 2007. Entered into force September 5, 2007.

22. Agreement for Cooperation in Astronomy and Astrophysics Research. Signed October 27, 2008. Entered into force October 27, 2008.

23. Agreement for Technical Cooperation associated with Development, Launch and Operation of a Constellation Observing System for Meteorology, Ionosphere and Climate Follow-on Mission. Signed May 10, 2010 and May 27, 2010. Entered into force May 27, 2010.

24. Agreement between AIT–TECRO for Technical Cooperation in Meteorology and Forecast Systems Development. Signed March 6, 2012 and December 1, 2011. Entered into force March 6, 2012.

25. Amendment #6 to the Agreement between AIT and TECRO for Technical Assistance in Areas of Water Resource Development. Signed May 7, 2012 and February 9, 2012. Entered into force May 7, 2012

26. Amendment #2 to Appendix #8 to the Agreement between AIT and TECRO for Technical Assistance in Areas of Water Resource Development. Signed May 29, 2012 and May 24, 2012. Entered into force May 29, 2012.

27. Agreement for Cooperation in the Learning and Observations to Benefit the Environment Program. Signed September 6, 2013 and September 6, 2013.

28. Agreement for Technical Cooperation associated with Establishing Satellite-Based Marine Oil Monitoring Collaborative Activity. Signed October 17, 2013 and October 9, 2013. Entered into force October 17, 2013.

Security of Information

1. Protection of information agreement. Signed September 15, 1981. Entered into force September 15, 1981.

Taxation

1. Agreement concerning the reciprocal exemption from income tax of income derived from the international operation of ships and aircraft. Effected by exchange of letters at Taipei May 31, 1988. Entered into force May 31, 1988.

2. Agreement for technical assistance in tax administration, with appendices. Signed August 1, 1989. Entered into force August 1, 1989.

Trade

1. Agreement concerning trade matters, with annexes. Effected by exchange of letters at Arlington and Washington October 24, 1979. Entered into force October 24, 1979; effective January 1, 1980.

2. Agreement concerning trade matters. Effected by exchange of letters at Arlington and Washington December 31, 1981. Entered into force December 31, 1981.

3. Agreement concerning measures that the CCNAA will undertake in connection with implementation of the GATT Customs Valuation Code. Effected by exchange of letters at Bethesda and Arlington August 22, 1986. Entered into force August 22, 1986.

4. Agreement concerning the export performance requirement affecting investment in the automotive sector. Effected by exchange of letters at Washington and Arlington October 9, 1986. Entered into force October 9, 1986.

5. Agreement concerning beer, wine and cigarettes. Signed at Washington December 12, 1986. Entered into force December 12, 1986, effective January 1, 1987.

6. Agreement implementing the agreement of December 12, 1986 concerning beer, wine and cigarettes. Effected by exchange of letters at Taipei April 29, 1987. Entered into force April 29, 1987, effective January 1, 1987.

7. Agreement concerning trade in whole turkeys, turkey parts, processed turkey products and whole ducks, with memorandum of understanding. Effected by exchange of letters at Arlington and Washington March 16, 1989. Entered into force March 16, 1989.

8. Agreement concerning the protection of trade in strategic commodities and technical data, with memorandum of understanding. Effected by exchange of letters at Arlington and Washington December 4, 1990 and April 8, 1991. Entered into force April 8, 1991.

9. Administrative arrangement concerning the textile visa system. Effected by exchange of letters at Arlington and Washington April 18 and May 1, 1991. Entered into force May 1, 1991.

10. Agreement regarding new requirements for health warning legends on cigarettes sold in the territory represented by CCNAA. Effected by exchange of letters at Washington and Arlington October 7 and 16, 1991. Entered into force October 16, 1991.

11. Memorandum of understanding concerning a new quota arrangement for cotton and man made fiber trousers. Signed at Washington December 18, 1992. Entered into force December 18, 1992.

12. Memorandum of understanding on the exchange of information concerning commodity futures and options matters, with appendix. Signed January 11, 1993. Entered into force January 11, 1993.

13. Agreement concerning a framework of principles and procedures for consultations regarding trade and investment, with annex. Signed at Washington September 19, 1994. Entered into force September 19, 1994.

14. Visa arrangement concerning textiles and textile products. Effected by exchange of letters of April 30 and September 3 and 23 1997. Entered into force September 23, 1997.

15. Agreement concerning trade in cotton, wool, man-made fiber, silk blend and other non-cotton vegetable fiber

textile products, with attachment. Effected by exchange of letters December 10, 1997. Entered into force December 10, 1997, effective January 1, 1998.

16. Agreed minutes on government procurement issues. Signed December 17, 1997. Entered into force December 17, 1997.

17. Understanding concerning bilateral negotiations on the WTO accession of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the United States. Signed February 20, 1998. Entered into force February 20, 1998.

18. Agreement on mutual recognition for equipment subject to electromagnetic compatibility (EMC) regulations. Signed March 16, 1999. Entered into force March 16, 1999.

19. Agreement concerning the Asia Pacific Economic Cooperation mutual recognition arrangement for conformity assessment of telecommunications equipment (APEC Telecom MRA). Signed March 16, 1999. Entered into force March 16, 1999.

20. Memorandum of understanding on the extension of trade in textile and apparel products. Signed February 9, 2001. Entered into force February 9, 2001.

21. Joint Arrangement for Sharing of Information Exchanged in Confidence. Signed September 7, 2010. Entered into force September 7, 2010.

[FR Doc. 2014–08984 Filed 4–18–14; 8:45 am]

BILLING CODE 4710–49–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10:00 a.m., Thursday, April 24, 2014.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance) Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED: 1. Share Insurance Fund Quarterly Review.

2. Request from CME Federal Credit Union (Columbus, Ohio) to Expand Its Community Charter.

3. NCUA's Rules and Regulations, Associational Common Bond Requirements.

4. NCUA's Rules and Regulations, Credit Union Capital Planning and Stress Testing.

RECESS: 11:00 a.m.

TIME AND DATE: 11:15 a.m., Thursday, April 24, 2014.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Share Insurance Appeals (3). Closed pursuant to Exemption (6).

FOR FURTHER INFORMATION CONTACT: Gerard Poliquin, Secretary of the Board, Telephone: 703–518–6304.

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2014–09111 Filed 4–17–14; 4:15 pm]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Request of Recommendations for Membership for Directorate and Office Advisory Committees

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) requests recommendations for membership on its scientific and technical Federal advisory committees. Recommendations should consist of the submitting person's or organization's name and affiliation, the name of the recommended individual, the recommended individual's curriculum vita (2–5 pages), an expression of the individual's interest in serving, and the following recommended individual's contact information: Employment address, telephone number, FAX number, and email address. Self recommendations are accepted. If you would like to make a recommendation for membership on any of our committees, please send your recommendation to the committee contact person listed below.

ADDRESSES: The mailing address for the National Science Foundation is 4201 Wilson Boulevard, Arlington, VA 22230.

Web links to individual committee information may be found on NSF Web site: *NSF Advisory Committees.*

SUPPLEMENTARY INFORMATION: Each Directorate and Office has an external advisory committee that typically meets twice a year to review and provide advice on program management; discuss current issues; and review and provide advice on the impact of policies, programs, and activities in the disciplines and fields encompassed by the Directorate or Office. In addition to Directorate and Office advisory committees, NSF has several committees that provide advice and recommendation on specific topics: astronomy and astrophysics; environmental research and education; equal opportunities in science and engineering; direction, development, and enhancements of innovations; advanced cyberinfrastructure; international and integrative activities; and business and operations.

A primary consideration when formulating committee membership is recognized knowledge, expertise, or demonstrated ability.[1] Other factors that may be considered are balance among diverse institutions, regions, and groups underrepresented in science, technology, engineering, and mathematics. Committee members serve for varying term lengths, depending on the nature of the individual committee. Although we welcome the recommendations we receive, we regret that NSF will not be able to acknowledge or respond positively to each person who contacts NSF or has been recommended. NSF intends to publish a similar notice to this on an annual basis. NSF will keep recommendations active for 12 months from the date of receipt.

The chart below is a listing of the committees seeking recommendations for membership. Recommendations should be sent to the contact person identified below. The chart contains web addresses where additional information about individual committees is available.

Advisory committee	Contact person
Advisory Committee for Biological Sciences *http://www.nsf.gov/bio/advisory.jsp.*	Charles Liarakos, Directorate for Biological Sciences; phone: (703) 292–8400; e-mail: *cliarako@nsf.gov;* fax: (703) 292–9154.
Advisory Committee for Computer and Information Science and Engineering *http://www.nsf.gov/cise/advisory.jsp.*	Carmen Whitson, Directorate for Computer and Information Science and Engineering; phone: (703) 292–8900; e-mail: *cwhitson@nsf.gov;* fax: (703) 292–9074.

[1] Federally registered lobbyists are not eligible for appointment to these Federal advisory committees.

Advisory committee	Contact person
Advisory Committee for Cyberinfrastructure *http://www.nsf.gov/od/oci/advisory.jsp.*	Kristen Oberright, Division of Advanced Cyberinfrastructure, phone: (703) 292–7151; *koborrig@nsf.gov*; fax: (703) 292–9060.
Advisory Committee for Education and Human Resources *http://www.nsf.gov/ehr/advisory.jsp.*	Amanda Edelman, Directorate for Education and Human Resources; phone: (703) 292–8600; e-mail: *aedelman@nsf.gov*; fax: (703) 292–9179.
Advisory Committee for Engineering *http://www.nsf.gov/eng/advisory.jsp.*	Cheryl Albus, Directorate for Engineering; phone: (703) 292–8300; e-mail: *calbus@nsf.govmailto:knarayan@nsf.gov*; fax: (703) 292–9013.
Advisory Committee for Geosciences *http://www.nsf.gov/geo/advisory.jsp.*	Melissa Lane, Directorate for Geosciences: phone: (703) 292–8500; e-mail: *mlane@nsf.gov*; fax: (703) 292–9042.
Advisory Committee for International Science and Engineering *http://www.nsf.gov/od/oise/advisory.jsp.*	Cassandra Dudka, Office of International and Integrative Activities, phone: (703) 292–7250; e-mail: *cdudka@nsf.gov*, fax: (703) 292–9067.
Advisory Committee for Mathematical and Physical Sciences *http://www.nsf.gov/mps/advisory.jsp.*	Kelsey Cook, Directorate for Mathematical and Physical Sciences; phone: (703) 292–7490; e-mail: *kcook@nsf.gov*; fax: (703) 292–9151.
Advisory Committee for Social, Behavioral & Economic Sciences *http://www.nsf.gov/sbe/advisory.jsp.*	Lisa Jones, Social, Behavioral & Economic Sciences; phone: (703) 292–8700; E-Mail: *lmjones@nsf.gov*; fax: (703) 292–9083.
Committee on Equal Opportunities in Science and Engineering *http://www.nsf.gov/od/oia/activities/ceose/http://www.nsf.gov/od/oia/activities/ceose/index.jsp.*	Bernice Anderson, Office of International and Integrative Activities; phone: (703) 292–8040; e-mail: *banderso@nsf.gov*; fax: (703) 292–9040.
Advisory Committee for Business and Operations *http://www.nsf.gov/oirm/bocomm/.*	Jeffrey Rich, Office of Information and Resource Management; phone: (703) 292–8100; e-mail: *jrich@nsf.gov*; (703) 292–9084.
Advisory Committee for Environmental Research and Education *http://www.nsf.gov/geo/ere/ereweb/advisory.cfm.*	Elizabeth Zelenski, Directorate for Geosciences; phone: (703) 292–8500; e-mail: *ezelensk@nsf.gov*; fax: (703) 292–9042.
Astronomy and Astrophysics Advisory Committee *http://www.nsf.gov/mps/ast/aaac.jsp.*	Elizabeth Pentecost, Division of Astronomical Sciences; phone: (703) 292–4907; e-mail: *epenteco@nsf.gov*; fax: (703) 292–9034.

Dated: April 9, 2014.

Suzanne Plimpton,

Acting Committee Management Officer.

[FR Doc. 2014–08976 Filed 4–18–14; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2014–0026]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 75, "Safeguards on Nuclear Material—Implementation of US/IAEA Agreement."
2. *Current OMB approval number:* 3150–0055.
3. *How often the collection is required:* Reporting is done when specified events occur. Recordkeeping for nuclear material accounting and control information is done in accordance with specific instructions.
4. *Who is required or asked to report:* Licensees of facilities on the U.S. eligible list who have been selected by the International Atomic Energy Agency (IAEA) for reporting or recordkeeping activities.
5. *The number of annual respondents:* 7 (2 reporting + 5 recordkeeping).
6. *The number of hours needed annually to complete the requirement or request:* 3960.4.
7. *Abstract:* Part 75 of Title 10 of the *Code of Federal Regulations*, requires selected licensees to provide reports of nuclear material inventory and flow for selected facilities under the US/IAEA Safeguards Agreement, permit inspections by IAEA inspectors, complementary access of IAEA inspectors under the Additional Protocol, give immediate notice to the NRC in specified situations involving the possibility of loss of nuclear material, and give notice for imports and exports of specified amounts of nuclear material. These licensees will also follow written material accounting and control procedures, although actual reporting of transfer and material balance records to the IAEA will be done through the U.S. State system (Nuclear Materials Management and Safeguards System, collected under OMB clearance numbers 3150–0003, 3150–0004, 3150–0057, and 3150–0058.) The NRC needs this information to implement its responsibilities under the US/IAEA agreement.

Submit, by June 20, 2014, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly-available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.*

The document will be available on the NRC's home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2014–0026.

You may submit your comments by any of the following methods: Electronic comments go to *http://www.regulations.gov* and search for Docket No. NRC–2014–0026. Mail comments to the Acting NRC Clearance Officer, Kristen Benney (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Questions about the information collection requirements may be directed to the Acting NRC Clearance Officer, Kristen Benney (T–5 F53), U.S. Nuclear

Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6355, or by email to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 16th day of April, 2014.

For the Nuclear Regulatory Commission.

Brenda Miles,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. 2014–09017 Filed 4–18–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on May 22, 2014, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Thursday, May 22, 2014—11:00 a.m. Until 12:00 p.m.

The Subcommittee will receive an information briefing on the state of affairs in the Division of License Renewal, Office of Nuclear Reactor Regulation. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: *Kent.Howard@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on November 8, 2013 (78 CFR 67205–67206).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: April 8, 2014.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2014–09014 Filed 4–18–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0001]

Sunshine Act Meeting Notice

DATE: Weeks of April 21, 28, May 5, 12, 19, 26, 2014.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of April 21, 2014

There are no meetings scheduled for the week of April 21, 2014.

Week of April 28, 2014—Tentative

There are no meetings scheduled for the week of April 28, 2014.

Week of May 5, 2014—Tentative

Thursday, May 8, 2014

9:00 a.m. Briefing on Subsequent License Renewal (Public Meeting) (Contact: William (Butch) Burton, 301–415–6332).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

3:00 p.m. Discussion of Security Issues (Closed Ex. 1).

3:30 p.m. Discussion of Management and Personnel Issues (Closed Ex. 2 and 6).

Friday, May 9, 2014

9:00 a.m. Meeting with the Advisory Committee on the Medical Uses of Isotopes (Public Meeting).

(Contact: Sophie Holiday, 301–415–7865).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of May 12, 2014—Tentative

Monday, May 12, 2014

9:30 a.m. Briefing on NRC International Activities (Closed—Ex. 1 & 9).

Week of May 19, 2014—Tentative

There are no meetings scheduled for the week of May 19, 2014.

Week of May 26, 2014—Tentative

Wednesday, May 28, 2014

9:00 a.m. Joint Meeting of the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) on Grid Reliability (Public Meeting).

(Contact: Jacob Zimmerman, 301–415–1220).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Thursday, May 29, 2014

9:00 a.m. Briefing on Human Reliability Program Activities and Analyses (Public Meeting).

(Contact: Sean Peters, 301–251–7582).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

* * * * *

Additional Information

The Briefing on Human Reliability Program Activities and Analyses scheduled on May 29, 2014, was rescheduled from March 3, 2014.

* * * * *

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you

need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *Kimberly.Meyer-Chambers@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *Darlene.Wright@nrc.gov*.

Dated: April 17, 2014.

Rochelle Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2014–09116 Filed 4–17–14; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2014–45; Order No. 2054]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing requesting the addition of a Global Plus 1C negotiated service agreement to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 23, 2014.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Commission Action
III. Ordering Paragraphs

I. Introduction

On April 15, 2014, the Postal Service filed notice that it has entered into an additional Global Plus 1C negotiated service agreement (Agreement).[1]

To support its Notice, the Postal Service filed a copy of the Agreement, a copy of the Governors' Decision authorizing the product, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

II. Notice of Commission Action

The Commission establishes Docket No. CP2014–45 for consideration of matters raised by the Notice.

The Commission invites comments on whether the Postal Service's filing is consistent with 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than April 23, 2014. The public portions of the filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Curtis E. Kidd to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2014–45 for consideration of the matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Curtis E. Kidd is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).

3. Comments are due no later than April 23, 2014.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2014–09004 Filed 4–18–14; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2014–44; Order No. 2053]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing requesting the addition of an International Business Reply Service Competitive Contract 3 (IBRS 3) negotiated service agreement to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 22, 2014.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Commission Action
III. Ordering Paragraphs

I. Introduction

On April 14, 2014, the Postal Service filed notice that it has entered into an additional International Business Reply Service Competitive Contract 3 (IBRS 3) negotiated service agreement (Agreement).[1]

To support its Notice, the Postal Service filed a copy of the Agreement, a copy of the Governors' Decision authorizing the product, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

II. Notice of Commission Action

The Commission establishes Docket No. CP2014–44 for consideration of matters raised by the Notice.

The Commission invites comments on whether the Postal Service's filing is consistent with 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than April 22, 2014. The public portions of the filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lawrence Fenster to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2014–44 for consideration of the

[1] Notice of the United States Postal Service of Filing a Functionally Equivalent Global Plus 1C Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, April 15, 2014 (Notice).

[1] Notice of the United States Postal Service Filing of a Functionally Equivalent International Business Reply Service Competitive Contract 3 Negotiated Service Agreement, April 14, 2014 (Notice).

matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Lawrence Fenster is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).

3. Comments are due no later than April 22, 2014.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2014–08953 Filed 4–18–14; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71950; File No. SR–C2–2014–009]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule

April 15, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 4, 2014, C2 Options Exchange, Incorporated (the "Exchange" or "C2") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 Options Exchange, Incorporated (the "Exchange" or "C2") proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. Currently, C2 Market-Maker fees for simple, non-complex orders in equity options classes (both Penny Pilot classes and non-Penny Pilot classes) are calculated using a formula.[3] The maximum fee is $0.85 per contract ($0.085 for mini-options). The Exchange would like to set a standard fee of $0.40 per contract ($0.04 for mini-options) for C2 Market-Makers for simple, non-complex orders in Penny Pilot equity options classes.[4] This set rate is lower than the maximum fee in order to encourage quoting in such classes, and would lower the fee paid by C2 Market-Makers trading simple, non-complex orders in Penny Pilot equity options classes in the majority of transactions.

In conjunction with the above proposed change, the Exchange also proposes to modify the maximum Public Customer Taker Rebate (also for simple, non complex orders in equity options classes) for Penny Pilot options.[5] Currently, the maximum rebate is $0.75 per contract ($0.075 for mini options), regardless of whether the options being traded are Penny Pilot classes or non Penny Pilot classes. The Exchange does not propose to change this maximum rebate with respect to non-Penny Pilot options, but does propose to lower the maximum rebate to $0.60 per contract ($0.06 for mini-options) for Penny Pilot options. Since the Exchange is setting a fixed maximum fee rate for C2 Market-Makers, the Exchange desires to ensure that the spread between the maximum fee for C2 Market-Makers and maximum Public Customer Taker Rebate is not so large as to become economically imprudent for the Exchange.

Also in conjunction with the above proposed changes, the Exchange also proposes to delete from Section 1B the statement that "For the BAC, MBI, BBRY, DELL and JCP equity options classes, the maximum fee will be $0.55 per contract and the maximum rebate will be $0.45 per contract." This will put BAC, MBI, BBRY, DELL and JCP (the "Special Classes") on the same competitive footing, from a fees standpoint, as all other classes, and the same fees that apply to all other classes will apply to the Special Classes. Because the Special Classes are all Penny Pilot classes, C2 Market-Maker fees for such trades will be $0.40 per contract and the maximum Public Customer Taker Rebate for such trades will be $0.60 per contract.

The Exchange also proposes to adopt a fee of $50 per month per login ID for PULSe workstation users that elect to access a COB Feed.[6] The COB Feed provides data (which has already been otherwise-available to PULSe Workstation users) on a data feed that specifically provides COB data. In order to improve the provision of this COB data, the Exchange has recently contracted an outside vendor to provide the COB Feed. The Exchange proposes to assess the new COB Feed Fee in order to recoup costs associated with the provision of the COB Feed.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Fee = (C2 BBO Market Width at time of execution) × (Market Participant Rate) × 50*

* For mini options, the multiplier will be 5 instead of 50.

BBO Market Width: Displayed C2 Ask Price Displayed C2 Bid Price.

The Market Participant Rate for C2 Market Makers is 30%.

For more information, see C2 Fees Schedule, Section 1B.

[4] The Exchange proposes to add the statement "The above fee structure calculation does not apply to C2 Market-Makers trading Penny Pilot options; such C2 Market-Makers will be assessed a fee of $0.40 per contract ($0.04 for mini-options)."

[5] For more information about the Public Customer Taker Rebate, see C2 Fees Schedule, Section 1B.

[6] "COB" stands for the Exchange's Complex Order Book. For a more detailed description of the PULSe workstation and its other functionalities, *see, e.g.*, Securities Exchange Act Release Nos. 63246 (November 4, 2010) 75 FR 69478 (November 12, 2010) (SR–C2–2010–007), 65279 (September 7, 2011), 76 FR 56824 (September 14, 2011) (SR–C2–2011–020), 65482 (October 4, 2011), 76 FR 62879 (October 11, 2011) (SR–C2–2011–028), and 69991 (July 16, 2013), 78 FR 43956 (July 22, 2013) (SR–C2–2013–026).

[7] 15 U.S.C. 78f(b).

of the Act,[8] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The Exchange believes the proposed change to the C2 Market-Maker fee for simple, non-complex orders in Penny Pilot equity options classes is reasonable because, in most transactions, it would lower the fee paid by C2 Market-Makers trading simple, non-complex orders in Penny Pilot equity options classes (and would lower the maximum fee for such transactions from $0.85 per contract to $0.40 per contract (and from $0.085 to $0.04 for mini-options)). The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply to all C2 Market-Makers, and C2 Market-Makers take on certain obligations, such as quoting obligations, that other market participants do not have.

The Exchange believes that the proposed change to the Public Customer Taker Rebate for simple, non-complex orders in Penny Pilot equity options classes is reasonable because Public Customers Taking liquidity in those Penny Pilot classes will still receive a rebate (instead of paying a fee). The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply to all Public Customer Takers. While the proposed change will lower the Public Customer Taker Rebate, Public Customers will still be the only market participants that receive said rebate. This is equitable and not unfairly discriminatory because the options industry has a long history of providing preferential pricing to Public Customers in order to encourage Public Customer trading, which benefits other market participants (who prefer to trade with Public Customers). Further, Public Customers often have less sophisticated trading systems and apparatuses than other market participants.

The Exchange believes that it is equitable and not unfairly discriminatory to offer different pricing for Penny Pilot and non-Penny Pilot options because Penny Pilot options and non-Penny Pilot options offer different pricing, liquidity, spread and trading incentives. The spreads in Penny Pilot options are tighter than those in non-Penny Pilot options (which trade in $0.05 and $0.10 increments). Further, a number of options exchanges offer different pricing for Penny Pilot and non-Penny Pilot options.

The Exchange believes that eliminating separate pricing for the Special Classes is reasonable, equitable and not unfairly discriminatory because this will place the Special Classes on the same competitive footing, from a pricing standpoint, as all other Penny Pilot classes, and the same pricing that applies to all other Penny Pilot classes will apply to the Special Classes.

The Exchange believes that the COB Feed Fee is reasonable because, in order to improve the provision of this COB data, the Exchange has recently contracted an outside vendor to provide the COB Feed, and the new COB Feed Fee will help serve to recoup costs associated with the provision of the COB Feed. The Exchange believes the COB Feed Fee is equitable and not unfairly discriminatory because it will be assessed equally to all PULSe workstation users that request the COB Feed.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule changes will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes regarding C2 Market-Maker pricing will apply to all C2 Market-Makers, and C2 Market-Makers take on certain obligations, such as quoting obligations, that other market participants do not have. The proposed changes regarding the Public Customer Taker Rebate will apply to all Public Customers. While the proposed change will lower the Public Customer Taker Rebate, Public Customers will still be the only market participants that receive said rebate. This is not a burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the options industry has a long history of providing preferential pricing to Public Customers in order to encourage Public Customer trading, which benefits other market participants (who prefer to trade with Public Customers). Further, Public Customers often have less sophisticated trading systems and apparatuses than other market participants. The COB Feed Fee will be assessed to all PULSe workstation users who request the COB Feed. C2 does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes are intended to encourage trading on C2 and make C2 a more competitive market (and may encourage more competitive pricing from other exchanges). To the extent that the proposed changes make C2 a more attractive market for market participants at other exchanges, such market participants may elect to become C2 market participants. The proposed change only affects trading on C2.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f) of Rule 19b–4[10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–C2–2014–009 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2014–009. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–C2–2014–009 and should be submitted on or before May 12, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–08974 Filed 4–18–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71914A; File No. SR–ISE–2014–20]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees; Correction

April 9, 2014.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** of April 15, 2014 concerning a Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Schedule of Fees. The date on which the International Securities Exchange, LLC filed the proposed rule change with the Securities and Exchange Commission was incorrectly stated.

Correction

In FR Document No. 2014–08417 beginning on page 21321 for Tuesday, April 15, 2014, the date on which the International Securities Exchange, LLC filed with the Securities and Exchange Commission the proposed rule change was incorrectly stated on page 21321, in the 53rd line of the third column. The correct date is April 1, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–08971 Filed 4–18–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71946; File No. SR–NYSEArca–2014–35]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule Regarding Transaction Fees and Credits

April 15, 2014.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 1, 2014, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule ("Fee Schedule") regarding transaction fees and credits. The Exchange proposes to implement the fee changes effective April 1, 2014. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule regarding transaction fees and credits. The Exchange proposes to implement the fee changes effective April 1, 2014. The purpose of this filing is to modify the Exchange's transaction fees to provide an incentive for more business to be executed on the Exchange.

NYSE Arca is proposing to modify certain volume based incentives to attract more business to the Exchange as well as a fee change to offset these incentives. The Exchange will offset the incentives by raising the Take Liquidity fee for Customer Electronic Executions in Penny Pilot issues[4] to $0.47 per contract.

First, NYSE Arca is proposing various modifications to its Customer Monthly Posting Credit Tiers and Qualifications For Executions in Penny Pilot Issues ("Penny Pilot Customer Tiers") to make some tiers less strenuous to achieve; make other tiers more difficult to reach, and to adjust the associated credits for various tiers. Specifically, the Exchange is proposing that the qualifying market share of Total Industry Customer equity and ETF option Average Daily Volume ("ADV") from executed Customer posted orders in all tiers of the Penny Pilot Customer Tiers be comprised of executed Customer posted orders in both Penny Pilot and non-Penny Pilot Issues ("Total Customer Posted Order Executions").[5]

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] As provided under NYSE Arca Options Rule 6.72, options on certain issues have been approved to trade with a minimum price variation of $0.01 as part of a pilot program that is currently scheduled to expire on June 30, 2014. *See* Securities Exchange Act Release No. 71159 (December 20, 2013), 78 FR 79042 (December 27, 2013) (SR–NYSEArca–2013–145).

[5] The Exchange notes that the alternative method of achieving Tiers 2 and 5 will remain at 0.70% and

This proposal includes adjusting the qualifying activity level and the corresponding credit of all but the top tier (*i.e.*, Tier 5) of the Penny Pilot Customer Tiers. To qualify for Tier 1 will only require .10% of Total Industry Customer equity and ETF ADV ("Total Customer ADV"); in return, the credit to be applied to Posted Electronic Customer Executions in Penny Pilot issues ("Penny Pilot Credit") will be reduced from $0.38 to $0.27. Penny Pilot Customer Tier 2 will be calculated based on Total Customer ADV, and the Penny Pilot Credit will be increased to $0.43. The qualification for Penny Pilot Customer Tier 3 will be reduced to 0.40% of Total Customer ADV, and the Penny Pilot Credit will be increased to $0.45. Penny Pilot Customer Tier 4 will be adjusted to increase the Total Customer Posted Executions to 0.60% of Total Customer ADV, while reducing the added qualification to executed ADV of Retail Orders to 0.1% ADV of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market. The Penny Pilot Credit for Tier 4 will be increased to $0.46.

The Exchange is also proposing to modify the Qualification Basis in one of the Customer Posting Credit Tiers in Non Penny Pilot Issues. Tier A will be modified to require 0.60% of Total Customer ADV Posted Order Executions, while reducing the added qualification of Retail Orders to 0.1% ADV of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market.

Lastly, the Exchange proposes a modification to one of the alternatives to achieve an additional posting credit under the Customer Incentive Program. As proposed, the fourth alternative, arising from participation on the NYSE Arca Equity Market, will require a lower threshold of Executed ADV of Retail Orders of 0.10% (reduced from 0.3%) ADV of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market.

The Exchange notes that the calculations for the qualification thresholds for tiered Customer posting credits only include electronic executions. Qualified Contingent Cross ("QCC") orders are neither posted nor taken; thus QCC transactions are not included in the calculation of posted or taken execution volumes. The calculations do not include volume from mini-option transactions, nor do they include volume from Complex Order transactions. Orders routed to another market for execution are not included in the calculation of taking volume.

The Exchange notes that the proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any problems that OTP Holders and OTP Firms, including Market Makers, would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed increase in the Take Liquidity fee for Customer orders in Penny Pilot issues is reasonable because it will result in the Exchange's fees remaining comparable to the Take Liquidity fees charged for other market participants. The proposed increase is also reasonable because it is similar to the fee charged by another market for Customers who remove liquidity in Penny Pilot issues.[8] In addition, the proposed fee change is reasonable because it will generate revenue that will help to support the credits offered for posting liquidity, which are available to all market participants. Customers are assessed a slightly lower fee because Customer order flow benefits the market by increasing liquidity, which benefits all market participants.

It is also not unfairly discriminatory to charge a lower fee for Customer transactions, as Customers do not have direct access to the market as do Market Makers, Firms, and Broker Dealers.

The Exchange believes the modifications to the Customer Monthly Posting Credit Tiers are reasonable because they are designed to attract additional Customer electronic equity and ETF option volume to the Exchange, which would benefit all participants by offering greater price discovery, increased transparency, and an increased opportunity to trade on the Exchange. The changes are also reasonable in that they make it less difficult for an OTP Holder or OTP Firm to achieve the qualifications. Additionally, the Exchange believes the proposed credits are reasonable because they would incent OTP Holders and OTP Firms to submit Customer electronic equity and ETF option orders to the Exchange and would result in credits that are reasonably related to the Exchange's market quality that is associated with higher volumes.

The Exchange believes that the proposed changes in the credits are equitable and not unfairly discriminatory because they will be available to all OTP Holders and OTP Firms that execute posted electronic Customer orders on the Exchange on an equal and non-discriminatory basis, in particular because they provide alternative means of achieving the same credit. The Exchange believes that providing methods for achieving the credits based on posted electronic Customer Executions in both Penny Pilot and non-Penny Pilot issues is equitable and not unfairly discriminatory because it would continue to result in more OTP Holders and OTP Firms qualifying for the credits and therefore reducing their overall transaction costs on the Exchange.

The Exchange believes the proposed change to the Customer Incentive Program is reasonable because it is designed is designed [sic] to continue to bring additional posted order flow to NYSE Arca Equities, so as to provide additional opportunities for all ETP Holders to trade on NYSE Arca Equities.

The Exchange also believes that the proposed modification to the Customer Incentive Program is equitable and not unfairly discriminatory because the Exchange is continuing to provide more than one method of qualifying for an incentive.[9]

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

0.85%, respectively, of Total Customer ADV from Posted Order executions only in Penny Pilot issues, although from all account types, including volume from the OTP Holder's or OTP Firm's affiliates.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *See* NASDAQ Options Market ("NOM")—Fees and Rebates, available at *http://www.nasdaqtrader.com/Micro.aspx?id=PHLXPricing* [sic].

[9] Offering multiple ways to achieve a rebate has been deemed acceptable based on past and existing practice in the industry. *See, e.g.*, NOM—Options Rules Chapter XV, Options Pricing, Section 2, which offers multiple methods of achieving the same rebate, available at *http://www.nasdaqtrader.com/Micro.aspx?id=PHLXPricing* [sic].

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[10] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed fee change reduces the burden on competition because it takes into account the value that various market participants add to the marketplace, as discussed above.

The increases in Take Liquidity fees will impact all Customer transactions in Penny Pilot issues at the same rate. The proposed changes to the Customer Monthly Posting Credit Tiers, and the proposed modification to the Customer Incentives are designed to attract additional volume, in particular posted electronic Customer executions, to the Exchange, which would promote price discovery and transparency in the securities markets thereby benefitting competition in the industry. As stated above, the Exchange believes that the proposed change would impact all similarly situated OTP Holders and OTP Firms that post electronic Customer executions on the Exchange equally, and as such, the proposed change would not impose a disparate burden on competition either among or between classes of market participants. In addition, providing and modifying an alternative qualification basis for certain tiers by including volume from affiliates allows a firm with a diverse business structure, but not a concentration on Customer orders only, to earn a higher credit for their Customers by posting order flow that improves the overall market quality, and encourages posting competitive prices, which result in better available markets for Customer orders.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

[10] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[11] of the Act and subparagraph (f)(2) of Rule 19b–4[12] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2014–35. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–35, and should be submitted on or before May 12, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–08973 Filed 4–18–14; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71945; File No. SR–NSCC–2014–802]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Advance Notice To Enhance NSCC's Existing Parametric Value-at-Risk Margining Model

April 15, 2014.

Pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[1] and Rule 19b–4(n)(1)(i)[2] thereunder, notice is hereby given that on March 28, 2014, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") advance notice SR–NSCC–2014–802 ("Advance Notice") as described in Item I, II and III below, which Items have been prepared primarily by NSCC. The

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(i).

Commission is publishing this notice to solicit comments on the Advance Notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The Advance Notice is filed by NSCC in connection with a proposed adjustment to NSCC's existing parametric Value-at-Risk ("VaR") margining model, as more fully described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

1. Purpose

In connection with its on-going assessment of the performance of its margining models, NSCC is proposing to enhance its existing parametric VaR model by supplementing the assumption of normal distribution underlying the current model with a family of Student's t-distributions. Currently, NSCC's parametric VaR methodology is based on the assumption that the underlying securities portfolio return distribution is normal. In an effort to enhance its parametric VaR model, NSCC has reviewed prevalent academic research and data analyses which show that the empirical distributions of securities portfolio returns in the equities markets have "fatter tails" than what the normal distribution implies, and VaR margin computed based only on the normality assumption may underestimate the tail risk that is observed during market volatility ("fat-tail" risk).

NSCC has evaluated a number of possible approaches to enhance its parametric VaR model in order to better accommodate fat-tail risks, and is proposing to apply an approach that is most appropriate for NSCC and its circumstances. As such, the proposed enhancement would utilize NSCC's existing parametric VaR model, and would supplement the normal distribution underlying the model with a factor that utilizes the degrees of freedom ("DOF") derived from a family of Student's t-distributions. The factor will help adjust the normal-based VaR model to better reflect the distribution of actual observed historical returns. Further, the existing normal distribution in the parametric VaR model will operate as a floor to the proposed adjustments.

2. Statutory Basis

The proposed change is being filed pursuant to Section 806(e)(1) of the Clearing Supervision Act, and is consistent with Rule 17Ad–22(b)(2), promulgated thereunder, which requires a registered clearing agency to "use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements." [3] Specifically, the adjustment is expected to allow NSCC's parametric VaR model to remain above its 99% coverage target during market volatility, and to more appropriately calculate and collect margin, which better enables NSCC to respond in the event that a Member defaults and minimizes potential losses to NSCC and its non-defaulting Members. As such, NSCC believes that the proposal promotes robust risk management and the safety and soundness of NSCC's operations, which reduce systemic risk and support the stability of the broader financial system, consistent with the requirements of Rule 17Ad–22(b)(2), cited above.

(B) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

In November 2013, NSCC distributed a White Paper to its Members that described the proposed enhancement to the parametric VaR model and the results of an impact study showing the potential impact of this proposal on Members' Clearing Fund required deposits. NSCC did not receive any written comments relating to the enhancement to the parametric VaR model in response to this White Paper. NSCC will notify the Commission of any written comments received by NSCC.

(C) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

1. Description of Change

(i) Overview

A primary objective of NSCC's Clearing Fund is to have on deposit from each applicable Member assets sufficient to satisfy losses that may otherwise be incurred by NSCC as the result of the default of the Member and the resultant close out of that Member's unsettled positions under NSCC's trade guaranty. Each Member's Clearing Fund required deposit is calculated daily pursuant to a formula set forth in Procedure XV of the NSCC's Rules and Procedures ("Rules") designed to provide sufficient funds to cover this risk of loss. The Clearing Fund formula accounts for a variety of risk factors through the application of a number of components, each described in Procedure XV. The VaR component is a core component of this formula and is designed to calculate the amount of money that may be lost on a portfolio over a given period of time assumed necessary to liquidate the portfolio, within a given level of confidence.

Parametric VaR models utilized in the equities markets have historically computed risk on the assumption that the underlying securities portfolio return distribution is normal. The increased frequency of market volatility in recent years has stressed the performance of parametric VaR models throughout the financial services industry. Analyses of these events and VaR models have shown that "fat-tail" risk may not be properly addressed by parametric VaR models that are based only on the normal distribution assumption. As such, it has become market practice to move away from the use of normal distribution assumptions in parametric VaR models and to instead use distributions, such as Student's t-distributions, that better accommodate these fat-tail risk events.

NSCC conducts back tests to measure the performance of Members' portfolios against the calculated VaR margin requirements for those portfolios. Over the past few years, these back tests have shown that, while NSCC's VaR margin component has remained mostly above its 99% coverage target when tested over a longer time horizon (a 12-month rolling window), coverage fell below the 99% target in a few instances in which back tests were conducted over shorter time frames (1-month windows). Therefore, and in connection with its on-going assessment of the performance of its margining models, NSCC has evaluated various possible approaches to enhance its parametric VaR model, and is proposing to apply an approach that incorporates Student's t-distributions into that model in a way that is appropriate for NSCC and its circumstances.

The proposal would enhance NSCC's existing parametric VaR model, which is

[3] 17 CFR 240.17Ad–22(b)(2).

used as part of the calculation of the VaR component, by supplementing the assumption of normal distribution underlying the current model with a factor that utilizes the DOF derived from a family of Student's t-distributions. The proposal is expected to improve NSCC's back-testing performance over shorter time horizons, particularly during more volatile market environments, and should enable the model to better account for the higher degree of fat-tail risk observed in equities markets.

(ii) Adjustment to Existing Parametric VaR Model

The proposed enhancement would utilize NSCC's current parametric VaR model, and would supplement the current normal distribution underlying the parametric VaR model with a factor that utilizes the DOF derived from a family of Student's t-distributions, which are more representative of the historically observed distributions in the equities markets. The Student's t-distributions would introduce an additional statistical parameter, the DOF factor, to the model. Following this enhancement, NSCC would estimate the DOF factor of the empirical t-distribution in the model periodically by using daily return data from the S&P 500 over a historical window no shorter than 12-months. NSCC would then compute a multiplication factor that represents the magnitude of increase of t-distribution-based parametric VaR from the normal-based parametric VaR. This multiplication factor would be applied to Members' VaR margin requirement.

NSCC has considered various alternatives to enhance its parametric VaR model, and its internal studies have shown that this proposed enhancement is an appropriate approach to addressing tail risks at NSCC, and may be a more effective enhancement to the model than other possible adjustments, including the augmented volatility model (AVM), which NSCC has also considered. In 2012, NSCC designed AVM to protect NSCC from elevated levels of volatility that were not captured in historical data by incorporating the CBOE VIX, a forward-looking measure of volatility, into the model. While both this proposal and AVM would improve NSCC's ability to meet its back-testing coverage target, the proposed enhancement to NSCC's parametric VaR model described in this filing is expected to be a more stable adjustment to Members' VaR margin components than AVM, while still improving the model's back-test performances.

2. Anticipated Effect on and Management of Risks

NSCC believes that the proposed enhancement to its current parametric VaR model would improve NSCC's risk management by enabling the model to remain above its 99% coverage target during market volatility, and to more appropriately calculate and collect margin, which better enables NSCC to respond in the event that a Member defaults. Further, incorporation of the DOF factor into NSCC's existing parametric VaR model should more accurately capture the fat-tail characteristics of stock market return distributions.

Additionally, NSCC has conducted extended outreach with its Members regarding the proposed enhancement, describing the proposed change, the reasoning for the change, and the potential impact of the change—both the expected impact on Members' Clearing Fund required deposits as well as the improvement to NSCC's risk management. This outreach included the publication of a White Paper to impacted Members in November 2013 as well as individual outreach to Members to discuss the results of impact studies. The proposed enhancement is expected to have a relatively low impact on Members' VaR margin components and thus a minimal impact on Members' overall Clearing Fund required deposits. NSCC did not receive any objections to the proposed change from Members in response to this outreach.

NSCC believes that the proposed change should allow it to collect margin that covers to a greater degree of certainty the risk that it may face during market volatility or even extreme market environments. While this change would impact NSCC's Members' Clearing Fund requirements, as stated above, NSCC's Members are aware of the proposed change and the potential impact on their Clearing Fund required deposits. Further, prior to implementation of the proposed changes, NSCC will run a parallel period during which Members would be able to further review the possible impact.

III. Date of Effectiveness of the Advance Notice, and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. NSCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing NSCC with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies NSCC in writing that it does not object to the proposed change and authorizes NSCC to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

NSCC shall post notice on its Web site of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. SR–NSCC–2014–802 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NSCC–2014–802. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and

printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NSCC–2014–802 and should be submitted on or before May 12, 2014.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–08972 Filed 4–18–14; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8702]

U.S. Advisory Commission on Public Diplomacy; Notice of Meeting

The U.S. Advisory Commission on Public Diplomacy will hold a public meeting from 10:00 a.m. until 11:30 a.m., Thursday, May 8, 2014 in Room B12 of The George Washington University's Elliot School of International Affairs at 1957 E Street NW., Washington, DC 20052.

The meeting's topic will be on "Defining the Role of Arts and Culture in National Security" and will feature Rick Ruth, Senior Advisor in the Education and Cultural Affairs Bureau at the U.S. Department of State, and Molly Fannon, Director of the Office of International Relations and Programs at The Smithsonian Institution. Other official representatives involved in arts and cultural diplomacy will also be in attendance.

This meeting is open to the public, Members and staff of Congress, the State Department, Defense Department, the media, and other governmental and non-governmental organizations. To attend and make any requests for reasonable accommodation, email *pdcommission@state.gov* by 5 p.m. on Tuesday, May 6, 2014. Please arrive for the meeting by 9:45 a.m. to allow for a prompt meeting start.

The United States Advisory Commission on Public Diplomacy appraises U.S. Government activities intended to understand, inform, and influence foreign publics. The Advisory Commission may conduct studies, inquiries, and meetings, as it deems necessary. It may assemble and disseminate information and issue reports and other publications, subject to the approval of the Chairperson, in consultation with the Executive Director. The Advisory Commission may undertake foreign travel in pursuit of its studies and coordinate, sponsor, or oversee projects, studies, events, or other activities that it deems desirable and necessary in fulfilling its functions.

The Commission consists of seven members appointed by the President, by and with the advice and consent of the Senate. The members of the Commission shall represent the public interest and shall be selected from a cross section of educational, communications, cultural, scientific, technical, public service, labor, business, and professional backgrounds. Not more than four members shall be from any one political party. The President designates a member to chair the Commission.

The current members of the Commission are: Mr. William Hybl of Colorado, Chairman; Ambassador Lyndon Olson of Texas, Vice Chairman; Mr. Sim Farar of California, Vice Chairman; Ambassador Penne Korth Peacock of Texas; Ms. Lezlee Westine of Virginia; and Anne Terman Wedner of Illinois. One seat on the Commission is currently vacant.

The following individual has been nominated to the Commission but awaits Senate confirmation as of this writing: Alfredo Balsera of Florida.

To request further information about the meeting or the U.S. Advisory Commission on Public Diplomacy, you may contact its Executive Director, Katherine Brown, at *BrownKA4@state.gov*.

Dated: April 14, 2014.

Katherine Brown,

Executive Director, Department of State.

[FR Doc. 2014–09013 Filed 4–18–14; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Prepare an Environmental Assessment (EA) for the Proposed Part 139 Operating Certificate and Related Actions at Paulding Northwest Atlanta Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to prepare an Environmental Assessment and notice of opportunity for public comment.

SUMMARY: The Federal Aviation Administration (FAA) is announcing its intent to prepare an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA) of 1969 and its implementing regulations for the application by Paulding County Airport Authority (PCAA) for certification of Paulding Northwest Atlanta Airport (PUJ) under 14 Code of Federal Regulations Part 139. The EA will also address connected actions related to the introduction of scheduled commercial air carrier service at PUJ. The purpose of the EA is to consider and evaluate the potential environmental impacts of the proposed actions and alternatives, including the no action alternative.

DATES: FAA invites comments on the contents of EA during a 30 day comment period that will be initiated upon publication of this Notice. Please submit any written comments you may have on the content of the EA May 21, 2014.

ADDRESSES: Please submit any written comments you may have on the content of the EA to Atlanta Airports District Office, Attn: Lisa Favors, Env. Program Manager, 1701 Columbia Ave., Suite 2 260, Atlanta, GA 30337–2747. Comments may also be submitted by email to *Lisa.Favors@faa.gov*.

FOR FURTHER INFORMATION CONTACT: Lisa Favors, Environmental Program Manager, Atlanta Airports District Office, 1701 Columbia Ave., Suite 2–260, Atlanta, GA 30337–2747, (404) 305–7145, *Lisa.Favors@faa.gov*.

SUPPLEMENTARY INFORMATION: Paulding Northwest Atlanta Airport (PUJ or airport) is located outside Atlanta, Georgia in the town of Dallas, Georgia. It is owned by Paulding County and the PCAA and operated by PCAA. It is designated as a general aviation airport. In 2013, the PCAA submitted an application to the FAA requesting a Part 139 Operating Certificate. A Part 139 Operating Certificate allows the airport to accommodate scheduled passenger-carrying operations, frequently referred to as "commercial service." The FAA plans to prepare an EA in accordance with FAA Order 1050.1E, Policies and Procedures for Considering Environmental Impacts and FAA Order 5050.4B, National Environmental Policy Act Implementing Instructions For Airport Actions.

It is anticipated that the EA will consider the potential environmental impacts associated with the following

proposed actions, and alternatives including the no-action alternative, at PUJ: (1) Obtain an Airport Operating Certificate from FAA, as required for commercial service under 14 CFR Part 139; (2) Relocate the Runway 13 threshold 500 feet west, to the end of the existing concrete pavement, which would increase the usable runway length from 5,505 feet to 6,005 feet; (3) Relocate the Runway 13 Precision Approach Path Indicators (PAPIs) by approximately 500 feet from their current location, to accommodate the threshold relocation; (4) Re-mark the runway and modify the runway lighting and electrical system to coincide with the new threshold location; (5) Extend the parallel taxiway 500 feet west, to connect with the end of the existing runway pavement; (6) Install approximately 19,000 linear feet of wildlife fencing around the perimeter of the Airport; (7) Construct an Aircraft Rescue and Fire Fighting (ARFF) facility adjacent to Airport Parkway, in conjunction with the construction by Paulding County of an Airport Fire Station/Emergency 911 Call Center; (8) Provide a mobile Air Traffic Control Tower in the existing terminal area; (9) Obtain FAA redesignation of airspace (to Class D) during periods when mobile Air Traffic Control Tower is in operation; (10) Construct corporate hangars in the existing terminal area; (11) Construct a terminal area expansion to provide hangars and apron area; (12) Design and construct a 400-foot extension of the Runway Safety Area (RSA) at the Runway 31 End to provide a 1,000 feet long by 500 feet wide RSA; (13) Design and install an approach lighting system consisting of a Medium-Intensity Approach Lighting System with Sequenced Flashers (MALSF) and towers; (14) Design paving and marking for a corporate hangar area expansion; (15) Design paving and marking for an itinerant parking area expansion; (16) Design paving and marking for a T-hangar tie-down area expansion; (17) Construct a blast pad on new pavement at the Runway 13 End; (18) Widen Runway 13–31 from 100 feet to 150 feet; (19) Provide temporary vehicle parking; and (20) Acquire land interest for approximately two (2) acres of property within the future Runway Protection Zone (RPZ) located west of the Runway 13 End.

In addition, the EA will consider the cumulative impacts of airport improvement projects recently completed at PUJ including a runway safety area expansion project and a taxiway widening and lighting project. The EA will also consider the environmental impacts of the introduction of scheduled commercial air carrier service to PUJ based on an air traffic forecast. In addition, or in the alternative to the forecast, the EA may consider a request by one or more commercial service air carrier(s) to amend its operating specifications to allow operation at PUJ. The EA will also consider the environmental impacts of similar actions not connected to the introduction of scheduled commercial air carrier service at PUJ but expected to occur at PUJ around the same time as the connected actions.

If, during preparation of the EA, it is determined that the proposed project would result in significant environmental impacts that cannot be mitigated, the FAA will issue a revised Notice of Intent (NOI) to complete the NEPA process using an Environmental Impact Statement (EIS).

The FAA is now inviting the public, agencies, tribal governments, and other interested parties to provide comments, suggestions, and input on the content of the EA. The FAA requests that comments be as specific as possible. The FAA will not provide responses to those submitting comments at this time, but all timely comments will be considered and included in the public record. Additional comments will be solicited on a draft EA, and at least one public meeting held in Paulding County, upon completion of the draft EA.

Issued in Atlanta, Georgia, on April 15, 2014.

Larry F. Clark,

Manager, Atlanta Airports District Office, Southern Region.

[FR Doc. 2014–09027 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2014–0011–N–7]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting the information collection requests (ICRs) below for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than June 20, 2014.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 17, Washington, DC 20590, or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self addressed stamped postcard stating, "Comments on OMB control number ". Alternatively, comments may be transmitted via facsimile to (202) 493–6216 or (202) 493–6497, or via email to Mr. Brogan at *Robert.Brogan@dot.gov*, or to Ms. Toone at *Kim.Toone@dot.gov*. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave, SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave, SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, sec. 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection

activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(i)–(iv); 5 CFR 1320.8(d)(1)(i)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a "user friendly" format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of currently approved information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Railroad Operating Rules.

OMB Control Number: 2130–0035.

Abstract: The collection of information is due to the railroad operating rules set forth in 49 CFR part 217 which require Class I and Class II railroads to file with FRA copies of their operating rules, timetables, and timetable special instructions, and subsequent amendments thereto. Class III railroads are required to retain copies of these documents at their systems headquarters. Also, 49 CFR 220.21(b) prescribes the collection of information which requires railroads to retain one copy of their current operating rules with respect to radio communications and one copy of each subsequent amendment thereto. These documents must be made available to FRA upon request. Through these rules, FRA learns the condition of operating rules and practices with respect to trains and instructions provided by the railroad to their employees in operating practices.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 720 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
217.7—Copy—FRA—Operating rules, timetables, Class I & II RRs.	2 new railroads	2 submissions	1 hour	2
—Amendments	55 railroads	165 amendments	20 minutes	55
—Copy of operating rules/timetables, etc. by Class III.	5 new railroads	5 submissions	55 minutes	5
—Amendments by Class III Railroads	687 railroads	2,061 amendments	15 minutes	515
217.9—RR and RR Testing Officer Qualification	720 railroads	4,732 field trained officers/training sessions.	8 hours	37,856
—Records of Qualification	720 railroads	4,732 records	2 minutes	
—Written Prog. of Operational Tests	5 new railroads	5 programs	9.92 hours	158
—Records of Operational Tests/Inspections	720 railroads	9,188,700 records	5 minutes	50
—Amendments	55 railroads	165 amendments	1.92 hours	765,725
—Quarterly Review of Accident/Incident Data/ Prior Op. Tests/Insp..	720 railroads	196 reviews	1 hour	317
—Designated Officers & Conduct of 6 Mo. Rev.	720 railroads	61 designations + 132 reviews.	5 seconds + 1 hour.	196
—Designated Officers & Conduct of Six Month Review by Passenger/Commuter Railroads.	Amtrak + 23 railroads	24 designations + 48 reviews.	5 seconds + 1 hour.	132
—Records of Periodic Reviews	720 railroads	752 review records	1 minute	48
—Annual Summary on Operational Tests/Insp.	61 railroads	61 summary records	61 minutes	13
—FRA Disapproval of RR Program of Operational Tests/Insp. & Response by RR.	720 railroads	10 supporting documents	1 hour	62
—Amended Prog. Docs.	720 railroads	10 amended documents	30 minutes	10
271.11—Instruction of Program Employees	720 railroads	130,000 instr. employees	8 hours	1,040,000
—New RR & Copy of Program of Op. Tests	5 new railroads	5 Programs	8 hours	40
—Amendments to Op. Rules Instr. Program	720 railroads	220 amendments	55 minutes	202
218.95—Instruction, Training, Examination—Records.	720 railroads	98,000 records	5 minutes	8,167
—Response to FRA Disapproval of Program	720 railroads	25 written/oral submissions.	1 hour	25
—Programs Needing Amendment	720 railroads	10 amended programs	30 minutes	5
218.97—Written Procedures on Good Faith Challenges by Employees Re: Actions.	720 railroads	41 written procedures	2 hours	82
—Employee Copy of Written Procedures	720 railroads	4,000 copies	6 minutes	400
—Employee Copy of Amended Procedures	720 railroads	125,000 copies	3 minutes	6,250
—Good Faith Challenges by RR Employees	98,000 RR Employees	15 challenges	10 minutes	3
—RR Responses to Empl. Challenge	720 railroads	5 immediate reviews	15 minutes	1
—Immediate Review of Employee Challenge	720 railroads	5 immediate reviews	15 minutes	1
—RR Officer Explanation of Federal Law Protection Against Retaliation.	720 railroads	5 explanations	1 minutes	.08
—Documented Protest by RR Employee	720 railroads	10 written protests	15 minutes	3
—Copies of Protests	720 railroads	10 protest copies	1 minute	
—Further Reviews	720 railroads	3 further reviews	15 minutes	17
Written Verification—Decision to Employee	720 railroads	10 verification decisions	10 minutes	1
				2

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Copy of Written Procedures at RR Hdtrs	720 railroads	773 copies of procedures	5 minutes	64
Copy of Verification Decision at RR Headquarters & Division Headquarters.	720 railroads	20 verification decision	5 minutes	2
218.99—Shoving or Pushing Movements.				
Operating Rule Modifications	720 railroads	41 rule modifications	1 hour	41
Locomotive Engineer Job Briefing Before Movement	100,000 RR Employees	60,000 job briefings	1 minute	1,000
Point Protection Determinations & Signals/Instructions to Control Movements.	100,000 RR Employees	87,600,000 determinations + 87,600,000 signals/instructions.	1 minute + 1 minute.	2,920,000
Remote Control Movements Verbal Confirmation.	100,000 RR Employees	876,000 confirmations	1 minute	14,600
Remote Control Determinations That Zone Is Not Jointly Occupied/Track Clear.	100,000 RR Employees	876,000 determinations	1 minute	14,600
Dispatcher Authorized Train Movements	6,000 RR Dispatchers	30,000 movements	1 minute	500
218.101—Operating Rule Re: Leaving Rolling & On-Track MOW Equipment in the Clear.	720 railroads	41 amended op. rules	30 minutes	21 hours
218.103—Hand-Operated Switches—RR Operating Rule That Complies w/§ 218.103.	720 railroads	41 modified operating rules.	1 hour	41
—Specification of Minimum Job Briefing Requirements.	720 railroads	55 modified op. rules	30 minutes	28
—Employee Operating or Verifying Position of Hand-operated Switches: Job Briefings.	720 railroads	1,125,000 job briefings	1 minute	18,750
218.105—Additional Requirements for Hand Operated Main Track Switches—Job Briefing.	720 railroads	60,000 job briefings	1 minute	1,000
—Roadway Worker Report on Position of Switches to Roadway Worker in Charge (RWIC) or Designated Employee Conveying Information to RWIC.	720 railroads	100,000 empl. reports + 100,000 conveyances.	1 minute + 1 minute.	3,334
—Dispatcher Acknowledgment of Switch Position and Employee Confirmation to Train Dispatcher.	720 railroads	60,000 acknowledgment + 60,000 confirmations.	30 seconds + 5 seconds.	583
218.109—Hand Operated Fixed Derails: Job Briefings.	720 railroads	562,500 hours	30 seconds	4,688

Total Estimated Responses: 188,669,706.

Total Estimated Annual Burden: 4,839,583 hours.

Status: Extension of a Currently Approved Collection.

Title: Reflectorization of Freight Rolling Stock.

OMB Control Number: 2130–0566.

Abstract: The Federal Railroad Administration (FRA) issued this regulation to mandate the reflectorization of freight rolling stock (freight cars and locomotives) to enhance the visibility of trains in order to reduce the number and severity of accidents at highway-rail grade crossings in which train visibility acted as a contributing factor. The information collected is used by FRA to ensure that railroads/car owners follow the schedule established by the regulation for placing retro-reflective material on the sides of freight rolling stock (freight cars and locomotives) in order to improve the visibility of trains. The information is also used by FRA to confirm that railroads/car owners meet the prescribed standards for the application, inspection, and maintenance of the required retro-reflective material.

Form Number(s): FRA F 6180.113.

Affected Public: Businesses.

Respondent Universe: 685 railroads and 4 Locomotive Manufacturers.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
224.7—Waivers	753 Railroads/Car Owners.	15 petitions	1 hour	15
224.15—Special Approval Procedures—Petitions	3 Manufacturers	12 petitions	40 hours	480
—Public Comment on Petitions	3 Manufacturers/Railroads.	3 comment	1 hour	3
224.107—Implementation Schedule: Freight Cars	753 Railroads/Car Owners.	200 reports/forms	15 minutes	50
—Existing Freight Cars with Retroreflective Sheeting.	753 Railroads/Car Owners.	200 reports/forms	20 hours	4,000
—Updated Reflectorization Implementation Plans: Failure Rpt..	753 Railroads/Car Owners.	5 failure reports	2 hours	10
II. Existing Cars w/Retroreflective Sheeting	753 Railroads/Car Owners.	172 reports/forms	20 hours	3,440
(b Existing Locomotives without Retroreflective sheeting.	753 Railroads/Car Owners.	35 reports/forms	15 minutes	9
Updated Reflectorization Compliance Reports	753 Railroads/Car Owners.	35 reports/forms	3 hours	105

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Failure reports after initial 24 mo.	753 Railroads/Car Owners.	1 failure report	2 hours	2
II. Existing Locomotives with Retroreflective Sheeting— Reports of Compliance.	753 Railroads/Car Owners.	150 reports/forms	4 hours	600
224.109—Inspection, Repair, Replacement—Freight Cars.	AAR + 300 Car Shops	272,600 Notices	2 minutes	9,090
—Locomotives: Records of Restrictions	22,045 Locomotives	4,809 records	3 minutes	240

Total Responses: 278,237.

Total Estimated Total Annual Burden: 18,044 hours.

Status: Extension of a Currently Approved Collection.

Title: Track Safety Standards: Concrete Crossties.

OMB Control Number: 2130–0592.

Abstract: On April 1, 2011, FRA amended the Federal Track Safety Standards to promote the safety of railroad operations over track constructed with concrete crossties. In particular, FRA mandated specific requirements for effective concrete crossties, for rail fastening systems connected to concrete crossties, and for automated inspections of track constructed with concrete crossties. The information collected under § 213.234 is used by FRA to ensure that automated track inspections of track constructed with concrete crossties are carried out as specified in this section to supplement visual inspections by Class I and Class II railroads, intercity passenger railroads, and commuter railroads or small government jurisdictions that serve populations greater than 50,000.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 18 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
213.234—Automated Inspection of Track Constructed with Concrete Crossties: Exception Reports Listing All Exception to § 213.109(d)(4).	18 Railroads	150 reports	8 hours	1,200
— Copies of Exception Report Provided to Designated Person under § 213.234(e)(1).	18 Railroads	150 report copies	12 minutes	30
—Field Verification of Exception Reports	18 Railroads	150 verification	2 hours	300
—Records of Inspection Data	18 Railroads	150 records	30 minutes	75
—Institution of Procedures by Track Owner to Maintain Integrity of Track Data Collected by the Measurement System.	18 Railroads	18 procedures	4 hours	72
—Training by Track Owner: Annual Training in Handing Rail Seat Deterioration Exceptions to All Persons Designated Fully Qualified under § 213.7.	18 Railroads	2,000 trained employees	8 hours	16,000

Total Responses: 2,618.

Total Estimated Total Annual Burden: 17,677 hours.

Status: Extension of a Currently Approved Collection.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on 15 April 2014.

Rebecca Pennington,

Chief Financial Officer.

[FR Doc. 2014–08949 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2014 0065]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ESCAPE TO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before May 21, 2014.

ADDRESSES: Comments should refer to docket number MARAD–2014–0065. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453,

Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ESCAPE TO is:

Intended Commercial Use of Vessel: "Bareboat and crewed leisure catamaran charters".

Geographic Region: "Florida".

The complete application is given in DOT docket MARAD–2014–0065 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.
Dated: April 15, 2014.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2014–09045 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2014 0067]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel CARIBBEAN SPIRIT; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before May 21, 2014.

ADDRESSES: Comments should refer to docket number MARAD–2014–0067. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CARIBBEAN SPIRIT is:

Intended Commercial Use of Vessel: "Daysails and overnight sailing charters on the East Coast, Primarily New England"

Geographic Region: "Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida."

The complete application is given in DOT docket MARAD–2014–0067 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: April 15, 2014.
By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2014–09048 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2014 0066]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel AIR BENDER; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before May 21, 2014.

ADDRESSES: Comments should refer to docket number MARAD–2014–0066. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.*

All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel AIR BENDER is: INTENDED COMMERCIAL USE OF VESSEL: "Operate as an uninspected passenger vessel (OUPV), fewer than 6 passengers; sailing, swimming, snorkeling, sport fishing for personal consumption; short duration cruises. Primary reason for waiver request to operate as OUPV is to offset the expense of owning and maintaining the boat (Air Bender). Future plans include traveling the coastal waters on the United States in this vessel."

Geographic Region: "Hawaii, Washington, California, Texas, Mississippi, Florida, South Carolina, North Carolina, Virginia, Maryland, Maine."

The complete application is given in DOT docket MARAD–2014–0066 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 15, 2014.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2014–09035 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60 day comment period was published January 16, 2014 at Vol. 79, No. 11 p. 2936–2938.

DATES: Comments must be submitted on or before May 28, 2014.

FOR FURTHER INFORMATION CONTACT: Andrea Noel at the National Highway Traffic Safety Administration, Office of Defects Investigation, NVS–210, 1200 New Jersey Avenue SE., Washington, DC 20590, phone 202–493–0210.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Record Retention.

OMB Number: 2127–0042.

Type of Request: Renewal of a currently approved information collection.

Abstract: Under 49 U.S.C. 30166(e), NHTSA "reasonably may require a manufacturer of a motor vehicle or motor vehicle equipment to keep records, and a manufacturer, distributor or dealer to make reports, to enable [NHTSA] to decide whether the manufacturer, distributor, or dealer has complied or is complying with this chapter or a regulation prescribed or order issued under this chapter."

To ensure that NHTSA will have access to this type of information, the agency exercised the authority granted in 49 U.S.C. 30166(e) and promulgated 49 CFR Part 576 Record Retention, initially published on August 20, 1974 and most recently amended on July 10, 2002 (67 FR 45873), requiring manufacturers to retain one copy of all records that contain information concerning malfunctions that may be related to motor vehicle safety for a period of five calendar years after the record is generated or acquired by the manufacturer. Manufacturers are also required to retain for ten years (five years for manufacturers of child seats and tires) the underlying records related to early warning reporting (EWR) information submitted under 49 CFR Part 579.

Affected Public: Businesses or other for profit.

Estimated Total Annual Burden: 40,020 annual hours burden (20 respondents times 1 hour, plus 1,000 respondents times 40 hours).

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC, on April 14, 2014.

Frank S. Borris, II,

Director, Office of Defects Investigation.

[FR Doc. 2014–09030 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket No. NHTSA–2014–0039]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from OMB. Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections. This document describes a collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before June 20, 2014

ADDRESSES: You may submit comments [identified by DOT Docket No. NHTSA 2014–0039] by any of the following methods:

- *Federal Rulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail: Docket Management Facility:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://docketsinfo.dot.gov/*.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Ms. Laurie Flaherty, Coordinator, National 911 Program, Office of Emergency Medical Services, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., NTI–140, Room W44–322, Washington, DC 20590. (202) 366–2705. *laurie.flaherty@dot.gov*.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60 day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses. In compliance with these requirements, NHTSA asks public comment on the following proposed collection of information:

Title: National 911 Profile Database.

OMB Control Number: N/A.

FORM Number: This collection of information uses no standard forms, but does utilize a Web-based, data reporting/collection tool (*http://resourcecenter.911.gov/code/9-1-1ProfileDatabase.aspx*).

Abstract: The National 911 Resource Center is funded by the National 911 Program, which is housed within the Office of Emergency Medical Services at NHTSA. The National 911 Resource Center is proposing to continue to collect and aggregate information from State level reporting entities that can be used to measure the progress of 911 authorities across the country in enhancing their existing operations and migrating to—digital, Internet-Protocol-based emergency communication networks. The data will be maintained in a "National 911 Profile Database." One of the objectives of the National 911 Program is to develop, collect, and disseminate information concerning practices, procedures, and technology used in the implementation of E–911 services and to support 911 Public Safety Answering Points (PSAPs) and related State and local agencies for 911 deployment and operations. The national 911 Profile Database can be used to follow the progress of 911 authorities in enhancing their existing systems and implementing next generation networks for more advanced systems. The information can also be used to identify ways in which the National 911 Program can support State and local 911 authorities in the transition process.

Description of the Need for the Information and Proposed Use of the Information: The goal of the data collection process is to support a national 911 profile that will be used to help accurately measure and depict the current status and planned capabilities of 911 systems across the United States. Evaluations, based upon the data collected, will help draw attention to key roadblocks and solutions in the deployment process and to target possible future activities and resources consistent with the goals of the program. The information in aggregated form will be available to State and local stakeholders in the public safety community. The information to be collected includes data useful to evaluating the status of 911 programs across the country, along with their progress of implementing advanced systems and capabilities. The data elements involved will fall within two major categories: baseline and progress benchmarks.

- "Baseline" data elements reflect the current status and nature of 911 operations from State to State. These elements are largely descriptive in nature, are intended to provide a general view of existing 911 services across the country, and are grouped within three categories: administrative, system, and fiscal data.
- "Progress benchmarks" reflect the status of State efforts to implement advanced, next generation 911 systems and capabilities. As titled, these data elements are largely implementation or deployment benchmarks against which progress can be measured. The elements involved are grouped in a logical order of planning, procurement, installation and testing, transition, and operations. Planning through testing elements reflects both State level and sub-State level activity and efforts. Transitional

and operational elements specifically represent the latter.

In order to collect information needed to develop and implement effective strategies that meet the Program's goal of providing leadership, coordination, guidance and direction to the enhancement of the Nation's 911 services, NHTSA proposes to utilize a Web-based, data reporting and collection tool accessible through the Web site: *http://resourcecenter.911.gov/code/9-1-1ProfileDatabase.aspx.*

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information):

Under this proposed effort, the 911 Resource Center would specifically request reporting entities to voluntarily collect and annually report the data described above utilizing the described Web-based data collection tool. Reporting entities are State-level 911 program officials, and the data reported will reflect State-level aggregated data. The total number of respondents is identified at 56, including the 50 States and the six U.S. Territories of Guam, U.S. Minor Outlying Islands, American Samoa, Mariana Islands, U.S. Virgin Islands, and Puerto Rico.

The above reporting entities will be requested to annually update data relating to their State or territory using the described Web-based tool.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting From the Collection of Information:

NHTSA estimates that the time required to annually report the data described utilizing the Web-based tool will be three hours (two hours of preparation, one hour of entry to Web site) per reporting entity, for a total of 168 hours for all entities. The respondents would not incur any reporting costs from the information collection beyond the time it takes to gather the information, prepare it for reporting and then populate the Web based data collection tool. The respondents also would not incur any recordkeeping burden or recordkeeping costs from the information collection.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC on: April 15, 2014.

Jeffrey P. Michael,

Associate Administrator, Research and Program Development.

[FR Doc. 2014–09028 Filed 4–18–14; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee on Gulf War Veterans' Illnesses; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Research Advisory Committee on Gulf War Veterans' Illnesses will conduct a telephone conference call meeting from 2:00 p.m. to 5:00 p.m. on Monday, March 19, 2014. The toll free number for the meeting is (800) 767–1750, and the access code is 56978#. The meeting is open to the public.

The purpose of the Committee is to provide advice and make recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans, and research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the Gulf War.

The Committee will discuss its 2014 Committee report. The session will also include discussion of other Committee business and activities.

A 30-minute time period will be reserved at 4:30 p.m. for public comments. Individuals who wish to address the Committee are invited to submit a 1–2 page summary of their comments for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Dr. Roberta White by email at *rwhite@bu.edu.*

Any member of the public seeking additional information should contact Dr. White, Scientific Director, at (617) 638–4620 or Dr. Victor Kalasinsky, Designated Federal Officer, at (202) 443–5682 or by email at *victor.kalasinsky@va.gov.*

Dated: February 25, 2014.

Rebecca Schiller,

Advisory Committee Management Officer.

[FR Doc. 2014–09021 Filed 4–18–14; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.
Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW- 2011–0880; FRL–9901–47–OW]

RIN 2040–AF30

Definition of "Waters of the United States" Under the Clean Water Act

AGENCY: U.S. Army Corps of Engineers, Department of the Army, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S.* v. *Riverside Bayview, Rapanos* v. *United States,* and *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC),* and *Rapanos* v. *United States (Rapanos).* This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

DATES: Submit comments on or before July 21, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2011–0880 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: ow-docket@epa.gov.* Include EPA–HQ–OW- 2011–0880 in the subject line of the message.
- *Mail:* Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2011–0880.
- *Hand Delivery/Courier:* Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OW–2011–0880. Such deliveries are accepted only during the Docket's normal hours of operation, which are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is 202–566–2426.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2011–0880. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA might not be able to consider your comment. Avoid the use of special characters and any form of encryption, and ensure that electronic files are free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Some information, however, is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov* or in hard copy at the Water Docket, EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4502–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202–566–2428; email address: *CWAwaters@epa.gov.* Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number 202–761–5856; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The *SWANCC* and *Rapanos* decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by Federal and State regulators. The agencies are proposing this rule to fully carry out their responsibilities under the Clean Water Act. The agencies are providing clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting, and whether individual water bodies are not jurisdictional and discharges are not subject to permitting.

Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case specific determinations, will require significant public involvement and engagement. Such involvement and engagement will allow the agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies—particularly on the category of waters known as "other waters."

The agencies propose to define "waters of the United States" in section (a) of the proposed rule for all sections of the CWA to mean: Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters,[1] or the territorial seas;

[1] "Interstate waters" in this preamble refers to all interstate waters including interstate wetlands.

and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional "waters of the United States" by rule—no additional analysis would be required. The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.

In addition, the agencies propose that "other waters" (those not fitting in any of the above categories) could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated "other waters" in the region should be identified.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as "other waters." To best meet their goals and responsibilities, the agencies request comment on alternate approaches to determining whether "other waters" are similarly situated and have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. In the discussion of "other waters" later in the preamble, the agencies seek comment on these other approaches and whether they could better meet the goals of greater predictability and consistency through increased clarity, while simultaneously fulfilling the agencies' responsibility to the CWA's objectives and policies to protect water quality, public health, and the environment. Commenters will specifically be asked to comment on whether and how these alternate approaches may be more consistent with the goal of clarity, and the CWA, the best available science, and the caselaw.

In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which "other waters" should be considered similarly situated for purposes of a case-specific significant nexus determination. The agencies seek comment on a number of alternative approaches. These alternatives include potentially determining waters in identified ecological regions (ecoregions) or hydrologic-landscape regions are similarly situated for purposes of evaluating a significant nexus, as well as the basis for determining which ecoregions or hydrologic-landscape regions should be so identified. The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.

Just as the agencies are seeking comment on a variety of approaches, or combination of approaches, as to which waters are jurisdictional, the agencies also request comment on determining which waters should be determined non-jurisdictional. The agencies seek comment on how inconclusiveness of the science relates to the use of case-specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.

The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case specific determination proposed in the rule.

The agencies' decision on how best to address jurisdiction over "other waters" in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013)) ("Report") and other available scientific information.

The agencies also propose to exclude specified waters from the definition of "waters of the United States" in section (b) of the proposed rule. The agencies propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA, no change to the exclusion for prior converted cropland,[2] and no change to the regulatory status of water transfers. The agencies propose, for the first time, to exclude by regulation certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a). There is no recapture provision for these excluded waters in the proposal.

In light of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining "waters of the United States").

The rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions in the CWA would continue to preclude application of CWA permitting requirements.

Finally, the agencies retain the existing regulatory definitions for the terms "adjacent" and "wetlands." The agencies propose for the first time to define the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus."

This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b).

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

This proposal requests public comment on issues associated with the

[2] The term "waters of the United States" does not include prior converted cropland, which is currently defined by the U.S. Department of Agriculture (USDA) for purposes of the Agriculture Act of 2014 at 7 CFR 122.2. EPA and the Corps use the USDA definition of prior converted cropland for purposes of determining jurisdiction under the CWA.

agencies' proposed regulatory definition of "waters of the United States." Because the agencies do not address the exclusions from the definition of "waters of the United States" for waste treatment systems and prior converted cropland or the existing definition of "wetlands" in this proposed rule the agencies do not seek comment on these existing regulatory provisions. This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment.

Table of Contents

I. General Information
A. How can I get copies of this document and related information?
B. Under what legal authority is this proposed rule issued?
II. Background
A. Executive Summary
B. The Clean Water Act and Regulatory Definition of Waters of the United States
C. Background on Scientific Review and Significant Nexus Analysis
1. Scientific Synthesis
2. Summary of Significant Nexus Conclusions
III. Proposed Definition of Waters of the United States
A. Summary of Proposed Rule
B. Traditional Navigable Waters
C. Interstate Waters
D. Territorial Seas
E. Impoundments
F. Tributaries
G. Adjacent Waters
H. Other Waters
I. Waters That Are Not Waters of the United States
IV. Related Acts of Congress, Executive Orders, and Agency Initiatives
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Environmental Documentation
Appendix A. Scientific Evidence
Appendix B. Legal Analysis

I. General Information

A. How can I get copies of this document and related information?

1. *Docket.* EPA and the Corps of Engineers have established an official public docket for this action under Docket Id. No. EPA–HQ–OW–2011–0880. The official public docket consists of the document specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.regulations.gov.* An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified earlier.

B. Under what legal authority is this proposed rule issued?

The authority for this proposed rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*

II. Background

A. Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) publish for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S.* v. *Riverside Bayview Homes, Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC),* and *Rapanos* v. *United States (Rapanos).* The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation. This rule provides increased clarity regarding the CWA regulatory definition of "waters of the United States" and associated definitions and concepts.

EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* (Washington, DC: U.S. Environmental Protection Agency, 2013)) ("Report"). The Report is under review by EPA's Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete. This proposal is also supported by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those downstream waters.

Appendix A of this preamble summarizes currently available scientific literature and the Report that are part of the administrative record for this proposal and explains how this scientific information supports the proposed rule. Additional data and information likely will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the rulemaking process is concluded. The

agencies are specifically requesting information that would inform the decision on how best to address "other waters." At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record and determine at that time what, if any, adjustments are appropriate for the final rule.

"Waters of the United States," which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation's economic and environmental health.[3] In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. A desire to protect these vital resources led Congress to pass the CWA in 1972 in order to restore and maintain the chemical, physical, and biological integrity of our nation's waters while recognizing, preserving, and protecting the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution within their borders. Decades of experience implementing the CWA's programs and existing science provide strong support for the regulatory and policy underpinnings of the proposed rule. The proposed rule was developed with an enhanced understanding of the importance of all aspects of tributary, wetland, and lake and pond systems and the ecological functions and services they provide.

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

The modern Clean Water Act was established by the Federal Water Pollution Control Act Amendments of 1972, which was substantially amended in 1977 and 1987. (The 1972 amendments were to the Federal Water Pollution Control Act originally enacted in 1948.) As stated in section 101(a), the objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Prior to the CWA, the Rivers and Harbors Appropriations Act of 1899 protected navigation and protected some waters from discharges of pollution.

The 1899 Act continues in force and applies primarily to the "navigable waters of the United States." The 1948 Federal Water Pollution Control Act called for programs eliminating or reducing the pollution of interstate waters and tributaries thereof, and improving the sanitary condition of surface and underground waters. The jurisdictional scope of the CWA is "navigable waters," defined in section 502(7) of the statute as "waters of the United States, including the territorial seas." Both the legislative history and the caselaw confirm that "waters of the United States" in the CWA are not limited to the traditional navigable waters. It is the CWA definition that is the subject of this proposed rule.

The term "navigable waters" is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program,[4] the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. However, while there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision.[5]

The CWA leaves it to EPA and the Corps to define the term "waters of the United States." Existing regulations (last codified in 1986) define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 122.2.

The U.S. Supreme Court addressed the scope of "waters of the United States" protected by the CWA in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court observed that the broad objective of the CWA to restore the integrity of the nation's waters "incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 133 (citing Senate Report 92–414).

The issue of CWA regulatory jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers, 531 U.S. 159* (2001). In *SWANCC,* the Court (in a 5–4 opinion) held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the

[3] The agencies use the term "water" and "waters" in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.

[4] While section 311 uses the phrase "navigable waters of the United States," EPA has interpreted it to have the same breadth as the phrase "navigable waters" used elsewhere in section 311, and in other sections of the CWA. *See United States* v. *Texas Pipe Line Co.,* 611 F.2d 345, 347 (10th Cir. 1979); *United States* v. *Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of "waters of the United States" in 40 CFR part 112 to ensure that the actual language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution & Response; Non-Transportation-Related Onshore & Offshore Facilities,* 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins.* v. *Johnson,* 541 F.Supp. 2d 165 (D. DC 2008). However, EPA interprets "navigable waters of the United States" in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as "navigable waters" in CWA section 502(7).

[5] For example, the CWA section 402 (33 U.S.C. § 1342) program regulates discharges of pollutants from "point sources" to "waters of the United States," whether these pollutants reach jurisdictional waters directly or indirectly. The plurality opinion in *Rapanos* noted that "there is no reason to suppose that our construction today significantly affects the enforcement of § 1342. . . . The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. at 743. Clean Water Act section 311(b)(1) provides: "[I]t is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States *[or] adjoining shorelines* . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States." (Emphasis added.) "Discharge" is broadly defined in CWA section 311(a)(2) to include "any spilling, leaking, pumping, pouring, emitting, emptying or dumping," with certain enumerated exceptions, and is not limited to point source discharges.

CWA. The Court noted that in the *Riverside* case it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States' " and that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167.

Five years after *SWANCC,* the Court again addressed the CWA term "waters of the United States" in *Rapanos* v. *United States,* 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water. . . ." *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such relatively permanent water bodies, *id.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months. . . ." *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy's concurring opinion took a different approach than the plurality's. Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC,* 531 U.S. at 167). He stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " 547 U.S. at 780. Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* Because Justice Kennedy identified "significant nexus" as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the "significant nexus" standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The four dissenting Justices in *Rapanos* would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluding that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the regulatory provisions defining "waters of the United States."

The proposed rule would revise the existing definition of "waters of the United States" consistent with the science and the above Supreme Court cases. The proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," and many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions or other bases for revision. As a result of the Supreme Court decisions in *SWANCC* and *Rapanos,* the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations.

The most substantial change is the proposed deletion of the existing regulatory provision that defines "waters of the "United States" as all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: Which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the proposed rule, these "other waters" (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus as defined by the proposed rule. Waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas would not be "waters of the United States." In addition, the proposed rule would for the first time explicitly exclude some features and waters over which the agencies have not generally asserted jurisdiction and in so doing would eliminate the authority of the agencies to determine in case specific circumstances that some such waters are jurisdictional "waters of the United States."

The agencies propose a rule that is clear and understandable and that protects the nation's waters, consistent with the law and currently available scientific and technical expertise. Continuity with the existing regulations, where possible, will reduce confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies also propose, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific significant nexus evaluation to determine whether they are "waters of the United States" and protected by the CWA. Finally, the agencies propose definitions for some of the terms used in the proposed regulation.

This preamble also presents several alternative options for determining the jurisdictional status of certain "other waters" that would rely less, or not at all, on case-specific significant nexus evaluations. The agencies may adopt one or a combination of these options for the final rule, after considering public comment and the evolving scientific literature on connectivity of waters. This preamble also seeks comment on a number of other ways that the agencies might provide even greater clarity, certainty, and predictability in determining which "other waters" are and are not subject to CWA jurisdiction. The agencies evaluated extensive peer reviewed science in making their determination in the proposed rule. However, the agencies also seek additional information that would enhance the predictability and accuracy of its jurisdictional determinations. The agencies request the type of information on the evolving scientific literature on connectivity of waters that could allow the agencies to rely less on case-specific significant nexus evaluations.

Under the proposed first section of the regulation, section (a), the agencies propose to define the "waters of the United States" for all sections

(including sections 301, 311, 401, 402, 404) of the CWA to mean:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

As discussed in further detail below, the rule would not change the following provisions of the existing rule (although some provisions have been renumbered): Traditional navigable waters; interstate waters; the territorial seas; and impoundments of "waters of the United States." In paragraph (a)(5) of the proposed rule, the agencies propose that all tributaries as defined in the proposed rule are "waters of the United States." While tributaries are "waters of the United States" under the existing regulation, the rule would for the first time include a regulatory definition of "tributary."

With this proposed rule, the agencies conclude, based on existing science and the law, that a significant nexus exists between tributaries (as defined in the proposed rule) and the traditional navigable waters, interstate waters, and the territorial seas into which they flow; and between adjacent water bodies (as defined in the proposed rule) and traditional navigable waters, interstate waters, and the territorial seas, respectively. Consequently, this rule establishes as "waters of the United States," all tributaries (as defined in the proposal), of the traditional navigable waters, interstate waters, and the territorial seas, as well as all adjacent waters (including wetlands). This will eliminate the need to make a case-specific significant nexus determination for tributaries or for their adjacent waters because it has been determined that as a category, these waters have a significant nexus and thus are "waters of the United States."

In paragraph (a)(6) of the proposed rule, the rule would clarify that adjacent waters, rather than simply adjacent wetlands, are "waters of the United States." The rule would further clarify the meaning of "adjacent" by defining one of its elements, "neighboring." The related terms of "riparian area" and "floodplain" are also defined in the proposed rule.

The rule states that on a case-specific basis "other waters" that have a significant nexus to a traditional navigable water, interstate water or the territorial seas are "waters of the United States." Unlike the categories of waters in paragraphs (a)(1) through (6), which would be jurisdictional by definition, these "other waters" would not be "waters of the United States" by definition; rather, these "other waters" would only be jurisdictional provided that they have been determined on a case-specific basis to have a significant nexus to a paragraph (a)(1) through (a)(3) water. Therefore, the rule also includes a definition of "significant nexus."

"Significant nexus" is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a "significant nexus." There is a gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these "other waters" as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a "significant nexus." In the proposed regulation the rule defines the following terms: adjacent, neighboring, riparian area, floodplain, tributary, wetlands, and significant nexus. However, the agencies also recognize that relying on a case-specific analysis provides less certainty to the regulated public on the jurisdictional status of other waters and is considering other approaches, as discussed later in this preamble.

The proposed section (b) excludes specified waters and features from the definition of "waters of the United States." Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a), even if they would otherwise satisfy the regulatory definition. Those waters and features that would not be "waters of the United States" are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - water-filled depressions created incidental to construction activity;
  - groundwater, including groundwater drained through subsurface drainage systems; and
  - gullies and rills and non-wetland swales.

The rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities, does not change regulatory exclusions for waste treatment systems and prior converted cropland, and does not change the regulatory status of water transfers. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions of the CWA would continue to preclude application of CWA permitting requirements. For example, if "other waters" are aggregated as similarly situated in the region and determined to be jurisdictional, any exempt activities that include a discharge to those waters would remain outside the regulatory requirements of the CWA. Exempted discharges are established under CWA sections 402, 502, and 404 and include:

Agricultural stormwater discharges; return flows from irrigated agriculture; normal farming, silvicultural, and ranching activities; upland soil and water conservation practices; construction or maintenance of farm or stock ponds or irrigation ditches; maintenance of drainage ditches; and construction or maintenance of farm, forest, and temporary mining roads.

To provide additional clarity to farmers, the agencies are today also issuing an interpretive rule clarifying the applicability of the permitting exemption provided under section 404(f)(1)(A) of the CWA to discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service conservation practice standards and that are designed and implemented to protect and enhance water quality. This interpretive rule was developed in coordination with the U.S. Department of Agriculture, was signed by EPA and the Army, and became effective immediately. The agencies recognize, however, the value of receiving public comment on the interpretive rule and are publishing it by separate notice in the **Federal Register**. The public is encouraged to provide their comments on the interpretive rule to the docket on the interpretive rule, Docket Id. No. EPA–HQ–OW–2013–0820, and not to this docket. The interpretive rule and the request for comments can be found at *http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm* and at *http://www.regulations.gov* via Docket Id. No. EPA–HQ–OW–2013–0820.

The proposed rule is expected to reduce documentation requirements and the time it takes to make approved jurisdictional determinations by decreasing the number of jurisdictional determinations that require case-specific significant nexus analysis evaluations. It will improve clarity for regulators, stakeholders and the regulated public by defining certain categories of waters as "waters of the United States" that previously required case-specific analyses prior to establishing CWA jurisdiction through the approved jurisdictional determination procedures. A comprehensive review of a growing body of scientific literature, as well as the agencies' growing body of scientific and technical knowledge and field expertise, led the agencies to conclude that it is reasonable to establish certain categories of waters that are jurisdictional by rule as they have a significant nexus to an (a)(1) through (a)(3) water, specifically tributaries to traditional navigable waters, interstate waters, or the territorial seas, and their adjacent waters and wetlands. Case-specific jurisdictional determinations would still be required for the "other waters" category in paragraph (a)(7) of the proposed rule. Under the alternate approaches affecting "other waters" described later in the preamble, the agencies request comment on the case-specific analysis.

A review of the scientific literature, including the Report of the peer-reviewed science, shows that tributaries and adjacent waters play an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas—and of other jurisdictional waters—because of their hydrological and ecological connections to and interactions with those waters. Therefore, it is appropriate to protect all tributaries and adjacent waters, because the tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, and the territorial seas function as an integrated system. Water flows through tributaries to downstream traditional navigable waters, interstate waters, and the territorial seas, and that water carries pollutants that affect the chemical, physical, and biological integrity of the (a)(1) through (a)(3) waters, including water quality, fisheries, recreation, and other ecological services.

In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . .'" 547 U.S. at 779. To protect the integrity of the waters subject to the CWA, the significant nexus standard must be implemented in a manner that restores and maintains any of these three attributes of traditional navigable waters, interstate waters, or the territorial seas. Waters adjacent to tributaries also provide ecological functions that, in conjunction with the functions provided by the tributaries they are adjacent to, have a significant influence on the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas.

Examples of the important functions provided by adjacent waters are the sequestering or transformation of pollutants to reduce inputs to tributaries and subsequently to downstream (a)(1) through (a)(3) waters, water storage, and sediment trapping. Thus, in some instances, the significance of adjacent waters is to prevent or delay a hydrological connection with downstream waters and store water and/or pollutants. Given the large scale systematic interactions that occur, and the substantial effects that result, among tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, or the territorial seas, a significant nexus exists that warrants making those categories of waters jurisdictional by rule.

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA.

Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of sections 402 and 404. Forty-six states and the Virgin Islands are authorized to administer the NPDES program under section 402, while two states administer the section 404 program. Additional CWA programs that utilize the definition of "waters of the United States" and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state. Under section 510 of the Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, protect groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this proposed rule would limit or impede any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes that have authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis, leaving them with more resources to protect their waters.

This proposal also recognizes the unique role of states related to water quantity and as stated in the CWA. The proposal does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

While a principal goal of this rulemaking is to improve clarity for determining jurisdiction under the CWA in light of the two most recent Supreme Court cases with the dual benefits of improving certainty and greater efficiency for determining whether waters are covered, there are other tools and approaches underway to increase efficiency as well. For example, to improve efficiencies, the EPA and the Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations at lower cost and improved speed than the existing primarily field-based approaches. In the normal course of making jurisdictional determinations, information derived from field observation is not always required in cases where a "desktop" analysis furnishes sufficient information to make the requisite findings. However, for more complex or difficult jurisdictional determinations, it may be helpful to supplement such information with field observation.

EPA and the Corps are very interested in identifying other emerging technologies or approaches that would save time and money and improve efficiency for regulators and the regulated community in determining which waters are subject to CWA jurisdiction. The agencies specifically invite comment on this topic.

The proposed rule will benefit the nation by helping to protect the services and functions these important water bodies provide consistent with the overarching objective of the CWA.

B. The Clean Water Act and Regulatory Definition of "Waters of the United States"

The Federal Water Pollution Control Act Amendments, now known as the Clean Water Act, were enacted in 1972. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA section 101(a). Its specific provisions were designed to improve the protection of the nation's waters provided under earlier statutory schemes such as certain sections of the Rivers and Harbors Appropriations Act of 1899 ("RHA") (33 U.S.C. 03, 407, 411) and the Federal Water Pollution Control Act of 1948 (62 Stat. 1155) and its subsequent amendments through 1970. The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." CWA section 502(7). The CWA leaves it to the agencies to define the term "waters of the United States." Existing agency regulations define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 230.3(s). Counterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11.

The current regulatory definition of "waters of the United States" provides two specific exclusions from "waters of the United States." Waste treatment systems designed to meet the requirements of the CWA and prior converted cropland are not "waters of the United States" under the agencies' current regulations. Under the regulations for prior converted cropland, notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. 33 CFR 328.3(a)(8).

C. Background on Scientific Review and Significant Nexus Analysis

1. Scientific Synthesis

EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* (Washington, DC: U.S. Environmental Protection Agency, 2013), (the "Report")). The draft Report provides a review and synthesis of the scientific information pertaining to chemical, physical, and biological connections from streams, wetlands, and open waters such as oxbow lakes, to downstream larger water bodies such as rivers, lakes, and estuaries in watersheds across the United States and the strength of those connections. While the scientific literature does not use the term "significant nexus," there is a substantial body of scientific literature on the chemical, physical, and biological connections between tributaries and adjacent waters and "other waters" and the downstream larger waters, and on the strength and the effect of these connections.

Connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. The structure and function of downstream waters are highly dependent on the constituent materials contributed by and transported through waters located elsewhere in the watershed. Connectivity for purposes of interpreting the scope of "waters of the United States" under the CWA serves to demonstrate the "nexus" between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. Based on the literature, the Office of Research and Development was able to assess the types of connections between the tributaries and adjacent waters and the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas.

However, as Justice Kennedy found in *Rapanos,* a mere hydrologic connection may not suffice in all cases to establish CWA jurisdiction and there needs to be "some measure of the significance of the connection for downstream water quality." 547 U.S. at 784–785 ("mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood"). The literature does not use the term "significant" but does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies from the connections among tributaries and adjacent waters and "other waters" and those downstream waters.

While "strength" of connections to and effects on the integrity of downstream waters and the "significance" of the nexus to the integrity of downstream waters are clearly related inquiries, "significant" is not a scientific term but rather a

determination of the agencies in light of the law and science. The relative strength of downstream effects informs the agencies' conclusions about the significance of those effects for purposes of interpreting the CWA. The data and conclusions in the Report concerning the strength of the relevant connections and effects of certain types of waters on downstream waters provide a foundation for the agencies' determinations that certain waters have effects on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas that are "significant" and thus constitute a significant nexus. As clarified in the proposed definition of "significant nexus" and consistent with Justice Kennedy's guidance, for an effect to be significant it must be more than speculative or insubstantial.

The Office of Research and Development's review and synthesis of more than a thousand publications from peer-reviewed scientific literature focuses on evidence of those connections from various categories of waters, evaluated singly or in aggregate, which affect downstream waters and the strength of that effect. Much of the scientific literature relied on does not use the terms traditional navigable waters, interstate waters, or the territorial seas. However, evidence of strong chemical, physical, and biological connections to larger rivers, estuaries and lakes applies to that subset of rivers, estuaries and lakes that are traditional navigable waters, interstate waters, or the territorial seas. The objectives of the Report are (1) to provide a context for considering the evidence of connections between downstream waters and their tributary waters, and (2) to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which the connections affect the function or condition of downstream waters. The connections and mechanisms discussed in the Report include transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and mercury; functions that adjacent waters perform, such as storing and cleansing water; movement of organisms or their seeds and eggs; and hydrologic and biogeochemical interactions occurring in and among surface and groundwater flows, including hyporheic zones and alluvial aquifers.

The Report concludes that the scientific literature clearly demonstrates that streams, regardless of their size or how frequently they flow, strongly influence how downstream waters function. Streams supply most of the water in rivers, transport sediment and organic matter, provide habitat for many species, and take up or change nutrients that could otherwise impair downstream waters. The Report also concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) have a strong influence on downstream waters. Such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

Regarding wetlands and open waters located outside of floodplains and riparian areas, the Report finds that they provide many benefits to rivers, lakes, and other downstream waters. If the wetland or open water has a surface or shallow subsurface water connection to the river network, it affects the condition of downstream waters. Where the wetland or open water is not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically, topographically, and ecologically, such that the significance of the connection is difficult to generalize across the entire group of waters.

Lastly, the Report concludes that to understand the health, behavior, and sustainability of downstream waters, the effects of small water bodies in a watershed need to be considered in aggregate. The contribution of material by, or an important water-retention function of, a particular stream, other open water, or wetland might be small, but the aggregate contribution by an entire class of streams, other open waters, and wetlands (e.g., all ephemeral streams in the river network) can be substantial.

In the proposed rule, the agencies interpreted the scope of "waters of the United States" in the CWA based on the information and conclusions in the Report, other relevant scientific literature, the agencies' technical expertise, and the objectives and requirements of the Clean Water Act. In light of this information, the agencies made judgments about the nexus between the relevant waters and the significance of that nexus and concluded that tributaries and adjacent waters, each as defined by the proposed rule, have a significant nexus such that they are appropriately jurisdictional by rule.

The Report is currently undergoing peer review by EPA's Scientific Advisory Board (SAB) and is available at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument.* A previous version of the Report dated October 11, 2011 underwent an independent peer review organized by the Eastern Research Group, Inc. (ERG). The purpose of the ERG-organized peer review was to determine whether the review and interpretation of the scientific literature was complete and correct, and if the conclusions in the Report were supported by the evidence. ERG was responsible for identifying and selecting the expert reviewers, managing the review, organizing and facilitating a one-day peer review meeting, and preparing the peer review summary report. ERG provided the reviewers with a letter of instruction and the technical charge, which asked for their comments on the various aspects of the draft report.

ERG convened the one-day meeting on January 31, 2012, in Washington, DC. The meeting was closed to the public and considered an internal EPA deliberative process. Observers from EPA and the Corps attended to listen to the discussions. At the close of the meeting, the reviewers developed some brief highlights of their discussions, which were provided with written post-meeting comments from individual reviewers in a report from ERG titled *"Peer Review Meeting of EPA's Draft Report: Connectivity of Streams and Wetlands to Downstream Waters—A Review and Synthesis of the Scientific Evidence, Post-Meeting Comments,"* dated February 16, 2012. The Office of Research and Development revised its Report in response to the peer review comments and submitted the Report to the SAB for peer review and a public process. This peer review report is available in the docket for the proposed rule.

The agencies have identified key aspects of the Report throughout this preamble and in Appendix A. The Report summarizes and assesses much of the currently available scientific literature that is part of the administrative record for this proposal, and informs the agencies during this rulemaking. Additional data and information will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the

rulemaking process is concluded. The agencies have relied on the best available scientific data and information—peer-reviewed literature—and would find, to the extent possible, additional peer-reviewed literature to be the most useful submissions. At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record. As noted below, the agencies particularly intend to review the rule provisions related to "other waters" in light of this record, and are soliciting comment on several alternative approaches to applying the science and the law for determining whether "other waters" are similarly situated and have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas.

2. Summary of Significant Nexus Conclusions

As the agencies developed this proposed definition of "waters of the United States," the agencies carefully considered available scientific literature and propose a rule consistent with their conclusions that a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

As discussed in this preamble and Appendix A, tributaries as proposed to be defined perform the requisite functions for them to be considered "waters of the United States" by rule. Tributary streams exert a strong influence on the character and functioning of downstream traditional navigable waters, interstate waters, and the territorial seas, either individually or cumulatively. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (which can be ephemeral, intermittent or perennial), in particular, supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas and are the most abundant stream-type in most river networks. In addition to water, tributary streams supply sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in downstream traditional navigable waters, interstate waters, and the territorial seas. Tributary streams are biologically connected to downstream traditional navigable waters, interstate waters, and the territorial seas by dispersal and migration of aquatic and semi-aquatic organisms, including fish, amphibians, plants, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between tributary streams and downstream traditional navigable waters, interstate waters, and the territorial seas interact via processes such as nutrient spiraling, in which tributary stream communities assimilate and chemically transform large quantities of nitrogen that would otherwise increase nutrient loading downstream.

As discussed in this preamble and Appendix A, adjacent waters, as defined in this proposal, perform the requisite functions for them to be considered "waters of the United States" by rule. Adjacent waters are either directly chemically, physically, or biologically connected with traditional navigable waters, interstate waters, and the territorial seas they are adjacent to, or they are connected to such waters through tributaries. These chemical, physical, and biological connections affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas through the export of channel-forming sediment and woody debris, storage of local groundwater sources of baseflow for downstream waters and their tributaries, and transport of organic matter. Wetlands and open waters located in riparian and floodplain areas remove and transform nutrients such as nitrogen and phosphorus. They provide nursery habitat for fish, and colonization opportunities for stream invertebrates. Adjacent waters, including those located in riparian and floodplain areas, serve an important role in the integrity of traditional navigable waters, interstate waters, and the territorial seas because they also act as sinks for water, sediment, nutrients, and contaminants that could otherwise negatively impact traditional navigable waters, interstate waters, and the territorial seas.

Finally, some non-adjacent waters may have, in certain circumstances, a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, but at this time the agencies are not proposing that a category of such "other waters" is jurisdictional by rule. These "other waters" may provide numerous functions of potential benefit to traditional navigable waters, interstate waters, and the territorial seas, including storage of floodwater; retention of nutrients, metals, and pesticides; and re-charge of groundwater sources of river baseflow. The functions of these "other waters" may affect downstream traditional navigable waters, interstate waters, and the territorial seas, depending on the characteristics of the connection to the river network. For "other waters," connectivity varies within a watershed and over time, making it difficult to generalize about their connections to, or isolation from, traditional navigable waters, interstate waters, and the territorial seas. These "other waters" would be evaluated on a case-specific basis under the proposed rule.

Under the existing regulations, "other waters" (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation or destruction of the water could affect interstate or foreign commerce. Jurisdictional decisions for these waters are being made on a case-specific basis. As a practical matter in the past, the agencies generally relied on the presence of migratory birds to indicate an effect on interstate commerce. In 2001, the Supreme Court in *SWANCC* rejected the use of migratory birds as a sole basis to establish jurisdiction over such "isolated" intrastate nonnavigable waters.

The proposed rule provides that "other waters" can be jurisdictional where there is a case-specific showing of a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. "Significant nexus" is not itself a scientific term. The science of connections and effects on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas informs an analysis of the facts and circumstances of the waters being considered under a "significant nexus" analysis.

Scientific literature establishes that "other waters" can have a relationship to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This relationship is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a "significant nexus." There is a

gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these "other waters" as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a "significant nexus."

The support for a determination that the nexus is significant will be based on a record that documents the scientific basis for concluding which functions are provided by the waters and why their effects on a traditional navigable water, interstate water, or the territorial seas are significant, including that they are more than speculative or insubstantial. The agencies considered multiple options for determining how best to balance the science and the policy options available to address "other waters." Those options ranged from establishing jurisdiction over all "other waters" with a nexus to traditionally navigable waters, interstate waters, or the territorial seas, with the agencies determining categorically the nexus to be significant, to declining to assert jurisdiction over any "other waters."

The agencies did not adopt the all in or the all out approach to "other waters." Based on the information currently available in the scientific literature, applicable caselaw, and the agencies' policy judgment about how best to provide clarity and certainty to the public regarding the jurisdictional status of "other waters" the agencies today propose the case-specific significant nexus analysis presented in this rule and explained in the preamble.

In addition to the proposed "other waters" approach in this rule, the agencies are requesting comment on a range of alternate approaches to inform their decision on how best to address "other waters." The agencies will consider the full administrative record, including comments requested and received, and the final Report, as revised in response to the SAB review, when developing the final rule, and may adopt one of the alternative approaches or combination of approaches and the proposal.

The agencies solicit comment on identifying subcategories of "other waters" that have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas and could be jurisdictional by rule, and subcategories of "other waters" where a significant nexus or its absence could not be determined as a class and could be subject to a case-specific analysis under the rule. The Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule. The agencies solicit comment on making such subcategories of waters with very strong connections jurisdictional by rule as well as on making subcategories of waters that do not have such connections subject to a case-specific analysis or categorically non-jurisdictional under the rule. Such comment should explain with supporting documentation why a particular subcategory of "other waters" might or might not have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.

The agencies do not propose absolute standards such as flow rates, surface acres, or a minimum number of functions for "other waters" to establish a significant nexus. A determination of the relationship of "other waters" to traditional navigable waters, interstate waters, and the territorial seas, and consequently the significance to these waters, requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide. The case-specific analysis called for in the proposed rule recognizes geographic and hydrologic variability in determining whether an "other water" or group of "other waters" possesses a "significant nexus" with traditional navigable waters, interstate waters, or the territorial seas.

III. Proposed Definition of "Waters of the United States"

A. Summary of Proposed Rule

This proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," and many of the existing provisions of that definition where revisions are not warranted. The agencies' goal is to promulgate a rule that is clear and understandable and protects the nation's waters, supported by science and consistent with the law. Continuity with the existing regulations, where possible, will minimize confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies also propose, where supported by scientific literature and consistent with the law, bright line categories of waters that are and are not jurisdictional. Waters in the "other waters" category are not a *per se* jurisdictional category. While the agencies considered multiple options for addressing jurisdiction over "other waters," the agencies concluded that they could not determine that all "other waters" were jurisdictional, or that all "other waters" were not jurisdictional. Therefore, the proposed rule requires a case-specific significant nexus evaluation to determine if such "other waters" are subject to CWA jurisdiction and the agencies are requesting comment on several alternate approaches, including approaches that would not include case-specific analysis, to inform the final rule. Finally, the agencies are for the first time proposing definitions for some of the terms used in the proposed regulation.

Under section (a) the agencies propose to define the "waters of the United States" for all sections of the CWA to mean:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

As discussed in further detail below, the agencies do not propose to change the following provisions (although some provisions have been renumbered): Traditional navigable waters ((a)(1), see Section III.B of this preamble); interstate waters ((a)(2), see Section III.C of this preamble); the territorial seas ((a)(3), see Section III.D of this preamble); and impoundments of "waters of the United States" ((a)(4), see Section III.E of this preamble). In paragraph (a)(5), the agencies are proposing that tributaries to waters identified in paragraphs (a)(1) through (a)(4) are "waters of the United States." While tributaries are "waters of the United States" under the existing regulation, the agencies propose for the first time a regulatory definition of "tributary" and propose that only those waters that meet the definition and flow

directly or indirectly to an (a)(1) through (a)(3) water are "waters of the United States" (see Section III.F of this preamble). In paragraph (a)(6), the agencies propose that adjacent waters, rather than simply adjacent wetlands, are "waters of the United States." The agencies also propose for the first time to define an aspect of adjacency—"neighboring"—and related terms (see Section III.G of this preamble). Finally, the agencies propose to define "waters of the United States" to include on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3). Unlike the *per se* jurisdictional categories in paragraphs (a)(1) through (6) of this section, such "other waters" are not *per se* jurisdictional under (a)(7); rather, these "other waters" are only jurisdictional provided that they have a significant nexus to (a)(1) through (a)(3) waters. Therefore, the agencies are providing a definition of "significant nexus" (see Section III.H of this preamble).

The second section of the proposed regulation, section (b), excludes specified waters from the definition of "waters of the United States." Those waters and features would not be "waters of the United States" even if they would otherwise be included within the categories in (a)(1) through (a)(7) above. They are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.
- The following features:
  - artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - water-filled depressions created incidental to construction activity;
  - groundwater, including groundwater drained through subsurface drainage systems; and
  - gullies and rills and non-wetland swales.

The agencies do not propose any changes to the existing exclusions for waste treatment systems designed consistent with the requirements of the CWA and for prior converted cropland. The CWA and current regulations also provide a number of exemptions from permitting for discharges associated with specific activities. The rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, silviculture, and ranching activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. The rule also does not affect either the existing statutory and regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2. The agencies propose for the first time to exclude by rule in section (b) certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction (see Section III.I of this preamble).

Finally, in section (c) of the proposed rule the agencies define a number of terms, of which "adjacent" and "wetlands" are unchanged from existing definitions The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters." The term neighboring, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).

The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3)),[6] significantly affects

[6] The terms "in the region" and "watershed" are used interchangeably in this document. The agencies have interpreted "in the region" to mean the watershed that drains to the nearest water identified in paragraphs (a)(1) through (a)(3), which we refer to as the single point of entry watershed.

the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3). For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3).

B. Traditional Navigable Waters

EPA and the Corps' existing regulations include within the definition of "waters of the United States" all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See, e.g.,* 33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1); 40 CFR 122.2 ("waters of the U.S."). This section of the regulation encompasses those waters that are often referred to as "traditional navigable waters." The agencies do not propose to make any changes to this section of the regulation. *See,* Appendix B, Legal Analysis.

For purposes of CWA jurisdiction, waters will be considered traditional navigable waters, and thus (a)(1) waters under the proposed rule, if:

- They are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;
- A Federal court has determined that the water body is navigable in fact under Federal law;
- They are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- They have historically been used for commercial navigation, including commercial waterborne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and the capacity of the water to be used in commercial navigation, including commercial recreational navigation (for example, size, depth, and flow velocity), and the likelihood of future commercial navigation, including commercial waterborne recreation. While a traditional navigable water need not be capable of supporting navigation at all times, the frequency, volume, and duration of flow are relevant considerations for determining if a water body has the physical characteristics suitable for navigation. A likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes. A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, must be supported by evidence.

This proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under section 404(g) of the CWA. *See* CWA section 404(g). The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for "waters of the United States" within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement[7] between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). Clarification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g).

C. Interstate Waters.

The existing EPA and Corps regulations define "waters of the United States" to include interstate waters, including interstate wetlands and the agencies' proposal today does not change that provision of the regulations. Interstate waters would continue to be "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, because interstate waters are "waters of the United States" under the CWA, the agencies are proposing to continue to include as jurisdictional tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters.

As discussed in more detail in Appendix B to this preamble, the language of the CWA indicates that Congress intended the term "navigable waters" to include interstate waters without imposing a requirement that they be traditional navigable waters themselves or be connected to traditional navigable waters. The precursor statutes to the CWA always subjected interstate waters and their tributaries to Federal jurisdiction. The text of the CWA, specifically CWA section 303 that establishes ongoing requirements for interstate waters, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent to protect interstate waters that were previously subject to Federal regulation. Other provisions of the statute provide additional textual evidence of the scope of the primary jurisdictional term of the CWA.

While congressional intent is clear, the agencies also have a longstanding regulatory interpretation that interstate waters fall within the scope of CWA jurisdiction. The agencies' interpretation was promulgated contemporaneously with the passage of the CWA and is consistent with the statutory and legislative history of the CWA. Furthermore, the Supreme Court has never addressed the CWA's coverage of interstate waters, and it is not reasonable to read its decisions in *SWANCC* and *Rapanos* to question the jurisdictional status of interstate waters or to impose additional jurisdictional requirements on interstate waters.

It is reasonable to assert jurisdiction over tributaries, adjacent wetlands and "other waters" that have a significant nexus to interstate waters consistent with the framework established by Justice Kennedy in *Rapanos* for establishing jurisdiction over waters with a significant nexus to traditional navigable waters. Justice Kennedy's standard seeks to ensure that waters Congress intended to subject to Federal jurisdiction are indeed protected, both by recognizing that waters and wetlands with a significant nexus to traditional navigable waters and interstate waters have important beneficial effects on those waters, and by recognizing that polluting or destroying waters with a significant nexus can harm downstream jurisdictional waters. As Congress intended to protect interstate waters, the agencies propose to also protect interstate waters by defining "waters of the United States" to include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters. For additional discussion of the agencies' interpretation of the CWA with respect

[7] Link to Michigan's and New Jersey's Memorandum of Agreement with the Army Corps of Engineers identifying which waters of the US remain under the Corps' jurisdiction. *http://water.epa.gov/type/wetlands/initiative_index.cfm.*

to interstate waters, see Appendix B to this preamble.

D. Territorial Seas

The CWA and its existing regulations include "the territorial seas" as a "water of the United States." The agencies propose to make no changes to that provision of the regulation other than to move the provision to earlier in the regulation. The CWA defines "navigable waters" to include the territorial seas at section 502(7). The CWA goes on to define the "territorial seas" as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The territorial seas establish the seaward limit of "waters of the United States." As the territorial seas are also clearly protected by the CWA (they are also traditional navigable waters), it is reasonable to use for protecting the territorial seas Justice Kennedy's significant nexus framework that protects traditional navigable waters. The proposed rule reflects that.

E. Impoundments

The agencies do not propose to make any substantive changes to the existing regulatory language with respect to impoundments of waters otherwise defined as 'waters of the United States' under this definition. The changes proposed are clarifying.

Impoundments are jurisdictional because as a legal matter an impoundment of a "water of the United States" remains a "water of the United States" and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non jurisdictional. *See S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."). Similarly, when presented with a tributary to the Snake River which flows only about two months per year because of an irrigation diversion structure installed upstream, the Ninth Circuit has opined "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *U.S.* v. *Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. Where flow continues below the impoundment, it is straightforward to analyze the stream network, above and below the impoundment, for connection to downstream traditional navigable waters, interstate waters, or the territorial seas.

The agencies also note that an impoundment of a water that is not a "water of the United States" can become jurisdictional if, for example, the impounded waters become navigable-in-fact and covered under paragraph (a)(1) of the rule.

The existing agency regulations provide that impoundments of "waters of the United States" remain "waters of the United States" and the agencies do not propose any substantive revisions to that component of the regulation. In addition, tributaries to an impoundment of a "water of the United States" are "waters of the United States" under this proposed rule. As a matter of law and science, an impoundment does not cut off a connection between upstream tributaries and a downstream (a)(1) through (a)(3) water, so tributaries above the impoundment are still considered tributary to a downstream (a)(1) through (a)(3) water even where the flow of water is impeded due to the impoundment. Scientific literature, as well as the agencies' scientific and technical expertise, and practical knowledge confirm that impoundments have chemical, physical, and biological effects on downstream waters (see Appendix A, Scientific Evidence).

Appendix A discusses the conclusion that it is reasonable to maintain jurisdiction over impoundments of "waters of the United States" not only as a legal matter, but because impoundments do not sever the effects the impounded "waters of the United States" have on the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters.

F. Tributaries

Under this proposal, the agencies provide a definition of "tributary" supported by the scientific literature. The agencies also propose that all waters that meet the proposed definition of tributary are "waters of the United States" by rule, unless excluded under section (b), because tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

With today's proposed regulation, the agencies confirm that these tributary waters have a significant nexus to a traditional navigable water, interstate water, or territorial sea such that they are "waters of the United States" without the need for a separate, case-specific significant nexus analysis. In practice, under this proposal any water that meets the definition of tributary (and is not excluded under section (b) of the proposed rule) is a "water of the United States," and the agencies would only need to determine that a water meets the definition of "tributary." *See* Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.A; Part II, i); and Appendix B, Legal Analysis.

Tributaries have a significant impact on the chemical, physical, and biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas—and they have a significant nexus and thus are jurisdictional as a category. The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream environments. Tributaries serve to store water, thereby reducing flooding, provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries.

1. What is a "tributary" for purposes of the proposed regulation?

The proposed rule defines "tributary" as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of

or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4).

While the agencies have not defined tributary in any previous regulation, this proposed definition is consistent with long standing practice and historical implementation of CWA programs. It is important to note that today's proposed definition also is based on best available science and the intent of the CWA.

To meet this definition, a water need not contribute flow directly to an (a)(1) through (a)(4) water. As the definition makes clear, the water may contribute flow directly or may contribute flow to another water or waters which eventually flow into an (a)(1) through (a)(4) water. Essentially, the water must be part of a tributary system that drains to an (a)(1) through (a)(4) water. Under the proposed definition, to be a "tributary," in addition to requiring that a water contribute flow to a traditional navigable water, interstate water or the territorial sea, the water must also have a bed and banks and ordinary high water mark (except where a wetland is a tributary), because these features generally are physical indicators of flow. The agencies identified these tributary characteristics as indicative that the water is the type of hydrologic feature protected under the CWA because, for example, of a tributary's ability to transport pollutants to downstream traditional navigable waters, interstate waters, and the territorial seas, and thereby have a significant effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(4).

The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today's proposed rule. When considering whether the tributary being evaluated eventually flows to an (a)(1) through (a)(4) water, the tributary connection may be traced using direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information. A bed and banks and ordinary high water mark (OHWM) generally are physical indicators of water flow. These physical indicators can be created by ephemeral, intermittent, and perennial flows.

The agencies' proposed definition of "tributary" includes waters such as rivers, streams, lakes, impoundments, wetlands, canals, and ditches not excluded in section (b) that, either directly or through other tributaries, convey water to traditional navigable waters, interstate waters, or the territorial seas. A tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of OHWM. The movement of water through a tributary can transport pollutants to downstream (a)(1) through (a)(4) waters, as either chemicals dissolved or suspended in the water column or adsorbed to sediment particles.

The existing Corps regulations define OHWM as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e). That definition is not changed by today's proposed rule. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM. Indicators of an OHWM may vary from region to region across the country.

Under the proposed definition of tributary, the upper limit of a tributary is established where the channel begins. Note that wetlands can be providing flow into a tributary at the upper limit of the channel and these would also be jurisdictional. The OHWM generally defines the lateral limits of a water, and its absence generally determines whether a tributary's channel or bed and banks has ended such that the upper limit of the jurisdictional tributary is identified. However, a natural or man-made break in bed and banks or OHWM does not constitute the upper limit of a tributary where bed and banks or OHWM can be found farther upstream, as discussed below.

In many tributaries, there are often natural or man-made breaks in the presence of a bed and banks or ordinary high water mark while hydrologic connectivity remains. For example, in some regions of the country where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times. Also, in many intermittent and ephemeral tributaries, including dry land systems in the arid and semi arid west, OHWM indicators can be discontinuous within an individual tributary due to the variability in hydrologic and climatic influences. The agencies proposed definition of "tributary" addresses these circumstances and states that waters that meet the definition of tributary remain tributaries even if such breaks occur. A water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. The presence of a bed and banks and an ordinary high water mark upstream of the break generally demonstrates that the tributary continues upstream of the break.

Waters that meet the definition of tributary under the proposed rule are jurisdictional even if there is an impoundment at some point along the connection from the tributary to the (a)(1) through (a)(3) water.

Longstanding agency practice has identified tributaries as including "natural, man-altered or manmade" water bodies. Natural, man-altered, and manmade tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas. The discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural or manmade (see further discussion below and Appendix A). Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly manmade or man-altered. For example, tributaries that have been channelized in concrete or otherwise have been human-altered, may still meet the definition of tributaries under the agencies' proposed regulation so long as they still contribute flow to an (a)(1) through (a)(4) water. The agencies' proposed definition of tributary provides a non-exclusive list of the types of waters, natural, man-altered and man-made, that may be tributaries: Wetlands, rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in

paragraph (b)(3) or (4) of the proposed rule.

Under the agencies' proposal, when a tributary flows through a wetland into another tributary (e.g., a run of stream wetland), losing its OHWM through the wetland, it remains a tributary, and the wetland itself is considered a tributary. Wetlands may contribute flow to a stream or river through channelized flow or diffuse flow, and sometimes both. Wetlands may also serve as water sources at the upper limit of headwater streams where the channel begins. In light of their potential to be important contributors of flow to tributaries to traditional navigable waters, interstate waters, or the territorial seas, the agencies propose a definition of tributary which includes such wetlands. In other instances, wetlands may serve as the connection between a tributary and another tributary or even a traditional navigable water, interstate water, or the territorial seas. For wetland tributaries, water may flow through braided channels that also include wetlands or through a run of stream wetland that does not have a bed and banks and OHWM.

It is the agencies' intent that the definitions in this proposed rule provide as much clarity and regulatory certainty as possible. While it is important to include wetlands that connect upstream and downstream portions of a tributary as jurisdictional waters because they have a significant nexus to downstream (a)(1) through (a)(4) waters, the agencies recognize that it may add an element of uncertainty to the definition of tributary to include features as tributaries which do not have a bed and bank and OHWM. An alternate approach would be to clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6). In this approach, a tributary would be defined as having a bed and bank and OHWM, and the upper limit of the tributary would be defined by the point where these features cease to be identifiable. (Note that natural or manmade breaks would still not sever jurisdiction if a tributary segment with a bed and bank and OHWM could be identified upstream of the break.) Wetlands would not be considered tributaries, but would remain jurisdictional as adjacent waters. Wetlands that contribute flow, for example at the upper reaches of the tributary system, would be considered adjacent waters. The agencies request comment on this alternate approach, as well as any other suggestions commenters may have on how to clarify the definition of tributaries and provide a clear explanation of their lateral and upstream extent.

Tidal ditches subject to the ebb and flow of the tide are not evaluated as tributaries, but are jurisdictional under paragraph (a)(1) of the proposed regulation as they are under the current regulation.

The agencies are proposing to clearly exclude from the definition of "waters of the United States" two types of ditches that might otherwise be evaluated as tributaries: Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). The proposed rule for the first time excludes certain ditches by rule rather than simply through preamble and guidance. Even before the decisions in *SWANCC* and *Rapanos*, the agencies excluded certain ditches from jurisdiction because they either are not part of the tributary system or because they are excavated wholly in uplands, drain only uplands, and are dry for much of the year, i.e. upland ditches. The agencies are proposing to continue this exclusion and, to provide improved consistency and clarity, further define flow characteristics of upland ditches that are and are not jurisdictional. The proposed rule would exclude from jurisdiction upland ditches with less than perennial flow. The scientific concept of perennial flow is a widely accepted and well understood hydrologic characteristic of tributaries. Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal. Identifying upland ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be included in the exclusion of paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.

Only those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary are "waters of the United States." Ditches that are excluded from the definition of "waters of the United States" under (b)(3) and (b)(4) cannot be recaptured and considered jurisdictional under any of the jurisdictional categories in section (a) of the proposed rule, such as a ditch that crosses a state line. This is true for all other features excluded under section (b) as well. Ditches not excluded under paragraphs (b)(3) and (4) of the proposed regulation meet the definition of tributary where they have a bed and banks and ordinary high water mark and they contribute flow directly or indirectly through another water to (a)(1) through (a)(4) waters. Such jurisdictional ditches may include, but are not limited to, the following:

- Natural streams that have been altered (*e.g.*, channelized, straightened or relocated);
- ditches that have been excavated in "waters of the United States," including jurisdictional wetlands;
- ditches that have perennial flow; and
- ditches that connect two or more "waters of the United States."

In an effort to distinguish ditches that are not "waters of the United States" from those that are "waters of the United States," the proposal states that ditches with less than perennial flow that are excavated in uplands, rather than in wetlands or other types of waters, for their entire length are not tributaries and are not "waters of the United States" under the proposed rule. Ditches that are perennial generally have water present year round when rainfall is normal or above normal. Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation. In addition, ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water or the territorial seas are not "waters of the United States," even if the ditch has perennial flow.

Historical evidence, such as photographs, prior delineations, or topographic maps, may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow. Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may not connect to another "water of the United States." Ditches created by altering natural waters would be considered "waters of the United States," so long as they contribute flow to another jurisdictional water. Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded,

however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow. Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) are not "waters of the United States."

2. What is not a tributary for purposes of this proposal?

Waters that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of the proposed regulation are not considered jurisdictional as tributaries under the CWA. However, even if such waters are not "tributaries," they may be jurisdictional under other paragraphs of the proposed rule. Note that waters specifically listed under the proposed section (b), including ditches as defined in paragraphs (b)(3) and (b)(4), would not be considered "waters of the United States" in any case. In addition, ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. The defined bed and bank no longer exists due to past normal farming practices such as plowing or discing (see section 404(f)(1)(A)),[8] and these farming practices often pre-date the CWA. Such farm field features are not tributaries even though they may contribute flow during some rain events or snowmelt.

Section J below discusses in more detail the agencies' proposed rule excluding specific waters and features from the definition of "waters of the United States." Of importance with respect to tributaries is the exclusion of gullies, rills, non-wetland swales, and certain ditches. These features are not considered tributaries under this proposed rule, even though rills and gullies and non-wetland swales (as described in Section J), may contribute flow to a tributary in systems with steep side slopes.

Non-jurisdictional geographic features (*e.g.*, non-wetland swales, ephemeral upland ditches) may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or the territorial sea, provided there is an actual exchange of water between those waters, and the water is not lost to deep groundwater through infiltration (i.e., transmission losses). In addition, these geographic features may function as "point sources," such that discharges of pollutants to waters through these features could be subject to other CWA authorities (*e.g.*, CWA section 402 and its implementing regulations).

The agencies request comment on all aspects of the proposed definition of tributaries and in particular on whether and how this definition can be revised to provide increased clarity as to the distinction between jurisdictional tributaries, as defined, and non-jurisdictional features such as gullies, rills and non-wetland swales. The agencies seek comments on how to provide greater regulatory certainty as to which specific aquatic features are jurisdictional tributaries, and which are not. Commenters should explain how any suggestions are consistent with the Clean Water Act, applicable caselaw, and the scientific literature regarding connectivity of aquatic features.

3. Why do the agencies conclude all tributaries are "waters of the United States"?

Assertion of jurisdiction over tributaries as defined in this proposed rule is appropriate under *Rapanos* both as a legal matter and as a scientific matter based on available science and the agencies' professional judgment and field expertise. The agencies conclude based on their scientific and technical expertise that tributaries, as defined in the proposed rule, in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

a. Legal Basis for Defining All Tributaries as "Waters of the United States"

In *Rapanos*, both the plurality opinion and Justice Kennedy's opinion discussed the Court's prior opinion in *Riverside Bayview* to begin their analysis of the scope of the CWA. Justice Scalia stated, "In *Riverside Bayview*, we stated that the phrase ['waters of the United States'] in the Act referred primarily to 'rivers, streams, and other *hydrographic features more conventionally identifiable as "waters"*' than the wetlands adjacent to such features. 474 U.S., at 131 (emphasis added)." *Rapanos*, 547 U.S. at 734. Justice Kennedy began, "As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante* at 12; *Riverside Bayview*, 474 U.S. at 133; see also *SWANCC*, *supra*, at 167." *Id* at 780. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Riverside Bayview*, *supra*, at 133; see also *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). In *Rapanos*, Justice Kennedy established a standard for determining whether wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: "if the wetlands, either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries. As discussed in this preamble, based on a detailed examination of the scientific literature, the agencies conclude that tributaries as they propose to define them perform the requisite functions identified by Justice Kennedy for them to be considered, as a category, to be "waters of the United States." Assertion of jurisdiction over tributaries with a bed and banks and OHWM is also consistent with *Rapanos* because five Justices did not reject the current regulations that assert jurisdiction over non-navigable tributaries of traditional navigable waters and interstate waters.

The agencies analyzed the Report and other scientific literature to determine whether tributaries to traditional navigable waters, interstate waters, or the territorial seas have a significant nexus to constitute "waters of the United States" under the Act such that it is reasonable to assert CWA jurisdiction over all such tributaries as a category by rule. The agencies' analysis of the available scientific literature, including the Report, demonstrates through an ecological rationale that tributaries draining to a traditional navigable water, interstate water, or the territorial seas have a significant nexus to such waters, especially because of their ability to transport pollutants to such waters that would impair their chemical, physical, or biological integrity.

One of the primary purposes and functions of the CWA is to prevent the discharge of petroleum wastes and other chemical wastes, biological and medical wastes, sediments, nutrients and all other forms of pollutants into the "waters of the United States," because such pollutants endanger the nation's

[8] A discharge of dredged or fill material into an existing tributary which converts a "water of the U.S." into a non-jurisdictional water requires authorization under section 404 of the CWA.

public health, drinking water supplies, shellfish, fin fish, recreation areas, etc. Because the entire tributary system of the traditional navigable, interstate waters or the territorial seas is interconnected, pollutants that are dumped into any part of the tributary system eventually are washed downstream to traditional navigable waters, interstate waters, or the territorial seas where those pollutants endanger public health and the environment.

The CWA regulates and controls pollution at its source, in part because most pollutants do not remain at the site of the discharge, but instead flow and are washed downstream through the tributary system to endanger drinking water supplies, fisheries, and recreation areas. These fundamental facts about the movement of pollutants and the interconnected nature of the tributary system demonstrate why all tributaries of traditional navigable waters, interstate waters, and the territorial seas, alone or in combination with other tributaries in a watershed have a significant nexus with those downstream waters. The significant nexus relating to pollution transport (or prevention of such transport) from all tributaries of traditional navigable waters, interstate waters, and the territorial seas to their downstream waters in and of itself justifies the assertion of CWA jurisdiction over all tributaries by rule.

b. The Agencies Conclude That Tributaries, as Defined in the Proposed Rule, Have a Significant Nexus

The finding of significant nexus is based on the chemical, physical, and biological interrelationship between a water, the tributary network, and traditional navigable waters, interstate waters, and the territorial seas. Based on their scientific and technical expertise, the agencies conclude that tributaries, as defined in today's proposed rule, have a significant nexus and are appropriately identified as jurisdictional by rule. *Rapanos,* 547 U.S. at 781–82 (J. Kennedy). (For more discussion, see Appendix A).

(1) Tributaries Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters

Physical connections between tributaries and traditional navigable waters, interstate waters, and the territorial seas result from the hydrologic transport of numerous materials, including water, sediment and organic matter (e.g., leaves, wood) from tributaries to downstream waters. This transport affects the physical characteristics of downstream waters. Tributaries, even when seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments.

One of the primary functions of tributaries is transporting sediment to downstream waters. Tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. Sediment transport is also provided by ephemeral streams. Effects of the releases of sediment and large woody debris are especially evident at tributary-river confluences, where discontinuities in flow regime and temperature demonstrate physical alteration of river structure and function by headwater streams.

Tributaries have vitally important effects on the physical integrity of (a)(1) through (a)(3) waters, contributing not only the majority of the flow in these waters but affecting the structure of the waters. These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are significant distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). Tributaries provide flow to downstream rivers necessary to support navigation. The agencies conclude that the tributaries alone or together with other tributaries in a watershed have a significant effect on the physical integrity of downstream waters.

(2) Tributaries Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters

Tributaries also influence the chemical composition of downstream waters, through the transport and removal of chemical elements and compounds, such as nutrients, ions, dissolved and particulate organic matter, pollutants, and contaminants. Ecosystem processes in tributaries transform, remove, and transport these substances to downstream waters. In turn, these chemical compounds can influence water quality, sediment deposition, nutrient availability, and biotic functions in rivers. Because water flow is the primary mechanism by which chemical substances are transported downstream, chemical effects are closely related to hydrological connectivity. Long-distance movement of contaminants provides another line of evidence for chemical connectivity between tributaries and traditional navigable waters, interstate waters, and the territorial seas and significantly affects these waters.

Within tributaries, there are processes that occur that transform and export nutrients and carbon to downstream waters, serving important source functions that influence the chemical integrity of downstream waters. Organic carbon, in both dissolved and particulate forms, exported from tributaries is consumed by downstream organisms. The organic carbon that is exported downstream thus supports biological activity (including metabolism) throughout the river network.

Tributaries have important effects on the chemical integrity of (a)(1) through (a)(3) waters, acting as both sinks and sources of chemical substances. They provide sink functions by trapping chemicals through absorption to sediments in the stream substrate (e.g., phosphorous adsorption to clay particles). They provide source functions by transporting chemicals to downstream (a)(1) through (a)(3) waters as chemicals dissolved in the waters or as chemicals attached to suspended sediments. Thus the tributaries of a watershed, alone or in combination, significantly affect the chemical integrity of downstream waters.

(3) Tributaries Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters

Tributaries, including intermittent and ephemeral streams, are critical in the life cycles of many organisms capable of moving throughout river networks. In fact, many organisms, such as anadromous salmon, have complex life cycles which involve migration through the river network, from headwaters to downstream rivers and oceans and back, over the course of their lives. Anadromous fish spend the majority of their life cycles in saltwater, but migrate upstream to inland freshwater systems in order to spawn and reproduce. More generally, in addition to providing critical habitat for complex life cycle completion, tributaries provide refuge from predators and adverse physical conditions in rivers, and they are reservoirs of genetic- and species-level diversity. These connections between tributaries and (a)(1) through (a)(3) waters significantly influence the biologic integrity of these waters.

Tributaries have important effects on the biological integrity of (a)(1) through (a)(3) waters, contributing materials to downstream food networks and supporting populations for aquatic species, including economically important species such as salmon, etc.,

and other essential habitat needs for species that utilize both tributaries and downstream (a)(1) through (a)(3) waters. These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are large distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). When all the tributaries in a watershed are considered together, these effects are significant.

(4) Small, Intermittent, and Ephemeral Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters

As discussed above, the agencies conclude that tributaries, including headwaters, intermittent, and ephemeral streams, and especially when all tributaries in a watershed are considered in combination, have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas based on their contribution to the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters. Tributaries, including headwater streams, within a watershed draining to a traditional navigable water, interstate water, or the territorial seas collectively shape the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters.

Tributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (*e.g.*, headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams. When their functional contributions to the chemical, physical, and biological conditions of downstream waters are considered at a watershed scale, the scientific evidence supports a legal determination that they meet the "significant nexus" standard articulated by Justice Kennedy in *Rapanos*.

(5) Tributary Lakes, Ponds, and Wetlands Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters

Although the above discussion refers primarily to stream tributaries, lake, pond and wetland tributaries also have the same or similar connections and functions that significantly affect (a)(1) through (a)(3) waters. Lakes and ponds that contribute surface water to downstream (a)(1) through (a)(3) waters satisfy the agencies' definition of tributary. They may be at the headwaters of the tributary network (*e.g.*, a lake with no stream inlets that has an outlet to the tributary network) or located outside of the headwaters, or farther downstream from the headwaters (*e.g.*, a lake with both a stream inlet and a stream outlet to the tributary network). Similarly, wetland tributaries are wetlands that are located within the stream channel itself or that form the start of the stream channel, such as channel-origin wetlands that are part of the headwaters of the tributary network.

As noted above, while these wetlands may function as part of the "tributary network," the agencies are seeking comment on whether it would provide greater regulatory clarity to exclude such wetlands from the definition of "tributary" because they generally lack a defined bed, bank and OHWM. These features are well understood by the public and agency field staff and have traditionally been the defining characteristics of tributaries. Rather, wetlands in headwaters or connecting tributaries would remain jurisdictional as adjacent waters under the definition of "adjacent" and its supporting terms (e.g., neighboring, floodplain, and riparian area) in this proposal.

Tributary lakes and ponds serve many important functions that affect the chemical, physical, and biological conditions downstream. Lakes can store floodwaters, sediment, and nutrients, as these materials have the opportunity to settle out, at least temporarily, as water moves through the lake downstream. Lakes, as with other tributaries, can also contribute flow, nutrients, sediment, and other materials downstream.

(6) Man Made or Man Altered Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters

This proposal expressly states that a tributary, including wetlands, can be a natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, impoundments, canals, and ditches that meet the definition of tributary and are not excluded from the definition of "waters of the United States" by paragraphs (b)(3) and (b)(4) of the proposed rule. The agencies' proposed rule clarifies that man-made and man-altered tributaries are "waters of the United States" because man-made and man-altered tributaries perform many of the same functions as natural tributaries, especially the conveyance of water that carries nutrients, pollutants, and other substances to traditional navigable waters, interstate waters, or the territorial seas. Man-made and man-altered tributaries also provide corridors for movement of organisms between headwaters and traditional navigable waters, interstate waters, or the territorial seas. The significant nexus between a tributary and a traditional navigable water, interstate water, or the territorial seas is not broken where the tributary flows through a culvert or other structure. The scientific literature recognizes that features that convey water, whether they are natural, man-made, or man-altered, provide the connectivity between streams and downstream rivers.

Tributary ditches and other man-made or man-altered waters, if they meet the definition of "tributary," have a significant nexus to (a)(1) through (a)(3) waters due to their effects on the chemical, physical, or biological integrity of those downstream waters. As described above, tributaries of all flow regimes have a significant nexus to downstream (a)(1) through (a)(3) waters. Due to the often straightened and channelized nature of ditches, these tributaries quickly move water downstream to (a)(1) through (a)(3) waters. Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule.

C. Adjacent Waters

The agencies propose to revise the existing jurisdictional category of "adjacent wetlands," which currently limits consideration to only wetlands, to include "adjacent waters." The proposed "adjacent waters" category would replace "adjacent wetlands" and would include wetlands and other waterbodies that meet the proposed definition of adjacent, including "neighboring." To be jurisdictional, it would be necessary to determine that a wetland or other waterbody meets the definition of "adjacent" water under proposed paragraph (a)(6). Adjacent waters are integrally linked to the chemical, physical, or biological functions of the (a)(1) through (a)(5) waterbodies to which they are adjacent. Waters adjacent to (a)(1) through (a)(3) waters have a significant nexus to those (a)(1) through (a)(3) waters. Waters adjacent to impoundments, (a)(4) and tributaries, (a)(5), are integrally linked to

the chemical, physical, or biological functions of the impoundments or tributaries and, through those waters, are integrally linked to the chemical, physical or biological functions of traditional navigable waters, interstate waters or the territorial seas. As such, where waterbodies are adjacent to (a)(4) or (a)(5) waters, they also have a significant nexus to (a)(1) through (a)(3) waters. *See* Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.B–C; Part II, ii) and Appendix B, Legal Analysis.

The proposed rule proposes to change "adjacent wetlands" to "adjacent waters" so that water bodies such as ponds and oxbow lakes, as well as wetlands, adjacent to jurisdictional waters are "waters of the United States" by rule. Second, the proposed rule adds a definition of the term "neighboring," a term which appears in the existing definition of "adjacent." The agencies propose a definition for "neighboring" to identify those adjacent waters that the agencies concluded have a significant nexus to (a)(1) through (a)(3) waters. To bring greater clarity to the meaning of "neighboring," the proposed rule adds scientifically based definitions for the terms "riparian area" and "floodplain" to define the lateral reach of the term "neighboring." Under the proposed rule, all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5); would be "waters of the United States." The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters." The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems. Finally, the term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

1. What are "adjacent waters" under the proposed rule?

"Adjacent waters" are wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas. These include waters and wetlands that are adjacent to traditional navigable waters, interstate waters, and the territorial seas as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments. The inclusion of adjacent waters in this category is supported by the Report, the collective body of scientific literature, the agencies' growing body of scientific and technical knowledge and practical expertise addressing the connectivity and ecological interactions of these waters on (a)(1) through (a)(3) waters, and by the determination made in this rulemaking that all adjacent waters in a watershed have a significant nexus with their traditional navigable waters, interstate waters or the territorial seas.

Under the existing rule, only wetlands adjacent to "waters of the United States" are defined as "waters of the United States." As noted in *San Francisco Baykeeper* v. *Cargill Salt*, 481 F.3d 700 (9th Cir. 2007), this provision of the agencies' regulations only defines adjacent wetlands, not adjacent ponds, as "waters of the United States." Prior to *SWANCC*, adjacent non wetland waters were often jurisdictional under the "other waters," or "(a)(3)" provision of the existing regulations which the agencies are proposing to eliminate. Waters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to (a)(1) through (a)(3) waters, and this proposed rule would include all adjacent waters, including wetlands, as "waters of the United States" by rule.

The existing definition of "adjacent" would be generally retained under today's proposal, with a clarification with respect to an existing provision addressing wetlands adjacent to other wetlands. The proposed rule states that the term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters." Within the definition of "adjacent," the terms bordering and contiguous are well understood, and for continuity and clarity the agencies would continue to interpret and implement those terms consistent with existing policy and practice.

The proposed rule also contains for the first time a definition of the term "neighboring." The term "neighboring" has generally been interpreted broadly in practice. The agencies provide a regulatory definition of "neighboring" that captures those waters that in practice the agencies have identified as having a significant effect on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. "Neighboring" is defined as including waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional water.

The terms "riparian area" and "floodplain" are also defined to further clarify how the agencies interpret the term "neighboring." Those new terms are found at paragraphs (c)(1) through (c)(4) of the proposed rule. The agencies emphasize that these terms help to identify waters, including wetlands, that may be "adjacent" and would, therefore, be "waters of the United States" under this proposed rule. Absolutely no uplands located in "riparian areas" and "floodplains" can ever be "waters of the United States" subject to jurisdiction of the CWA.

Most waters, including wetlands, that are neighboring to a water body are found within its riparian zone or floodplain. However, there are some neighboring waters that might be located outside of the riparian zone or floodplain, such as wetlands immediately next to a highly incised and manipulated stream that no longer has a riparian area or a floodplain. Waters, including wetlands, determined to have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water would also be "waters of the United States" by rule as adjacent waters falling within the definition of "neighboring."

In circumstances where a particular water body is outside of the floodplain and riparian area of a tributary, but is connected by a shallow subsurface hydrologic connection or confined surface hydrologic connection with such tributary, the agencies will also assess the distance between the water body and tributary in determining whether or not the water body is adjacent. "Adjacent" as defined in the agencies' regulations has always included an element of reasonable proximity. *See Riverside Bayview*, 474 at

133–34 ("Following the lead of the Environmental Protection Agency, see 38 FR 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality: . . . 'For this reason, the landward limit of Federal jurisdiction under Section 404 must include wetlands that are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.'" *quoting* 42 FR 37128, July 19, 1977). Therefore, the determination of whether a particular water meets the definition of "neighboring" because the water is connected by a shallow subsurface or confined surface hydrologic connection is made in the context of the terms "neighboring" and "adjacent" as used in the regulation.

The element of reasonable proximity is informed by the scientific literature, supplemented by agency practice, which leads to a recognition of the role of hydrologic connections in supporting a significant chemical, physical, and biological relationship between water bodies, but this relationship can be reduced as the distance between water bodies increases. The agencies recognize that in specific circumstances, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination.

While the agencies' best professional judgment has always been a factor in determining whether a particular wetland is "adjacent" under the existing definition, the agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an "adjacent" water. The agencies therefore request comment on whether there are other reasonable options for providing clarity for jurisdiction over waters with these types of connections.

Options could include asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent. The agencies note that under the proposed rule any waters not fitting within (a)(1) through (a)(6) categories would instead be treated as "other waters."

Both confined surface and shallow subsurface connections are forms of direct hydrologic connections between adjacent waters and (a)(1) through (a)(5) waters. For purposes of this rule, confined surface connections consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches. In some cases, these connections will be a result of "fill and spill" hydrology. A directional flowpath is a path where water flows repeatedly from the wetland or open water to the nearby "water of the United States" that at times contains water originating in the adjacent wetland or open water as opposed to just directly from precipitation.

For the purposes of this rule, "fill and spill" describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. Report at 5–62 (citing T.C. Winter and D.O. Rosenberry, "Hydrology of Prairie Pothole Wetlands during Drought and Deluge: A 17-year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records," *Climatic Change* 40:189–209 (1998); S.G. Leibowitz, and K.C. Vining, "Temporal connectivity in a prairie pothole complex," *Wetlands* 23:13–25 (2003)). Water connected through such flows originates from the adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface. Surface hydrologic connections via physical features or discrete features described above allow for confined, direct hydrologic flows between an adjacent water and the (a)(1) through (a)(5) water that it neighbors.

A shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans. K.J. Devito, *et al.*, "Groundwater-Surface Water Interactions in Headwater Forested Wetlands of the Canadian Shield," *Journal of Hydrology* 181:127–47 (1996); M.A. O'Driscoll, and R.R. Parizek, "The Hydrologic Catchment Area of a Chain of Karst Wetlands in Central Pennsylvania, USA," *Wetlands* 23:171–79 (2003); B.J. Cook, and F.R. Hauer, "Effects of Hydrologic Connectivity on Water Chemistry, Soils, and Vegetation Structure and Function in an Intermontane Depressional Wetland Landscape," *Wetlands* 27:719–38 (2007).

A shallow subsurface connection also exists, for example, when the adjacent water and neighboring (a)(1) through (a)(5) water are in contact with the same shallow aquifer. Shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. A combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrograph (for example, when the hydrograph indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower than in the shallow subsurface.

Shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions. While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not "waters of the United States."

For waters outside of the riparian area or floodplain, confined surface hydrologic connections (as described above) are the only types of surface hydrologic connections that satisfy the requirements for adjacency. Waters outside of the riparian area or floodplain that lack a shallow subsurface hydrologic connection or a confined surface hydrologic connection would be analyzed as "other waters" under paragraph (a)(7) of the proposed rule.

Application of the terms "riparian area," "floodplain," and "hydrologic connection" would be based in part on best professional judgment and experience applied to the definitions contained in this rule. The new definitions of riparian area and floodplain are designed to provide greater consistency, clarity, and certainty in determining the

circumstances under which a particular water meets the definition of the term adjacent. The addition of these two terms to the definition of "neighboring" is based on the scientific literature and agencies' knowledge of and expertise on river systems, which shows that water bodies such as wetlands, ponds, and oxbow lakes located within the riparian areas and floodplains of (a)(1) through (a)(5) waters generally have substantial hydrologic and ecologic connections with the waters that they neighbor.

These proposed definitions are adapted from scientific definitions using the concepts that are most relevant and useful in the context of the CWA. Use of the floodplain in characterizing the term "neighboring" is intended to provide greater clarity and predictability in the determination of when waters are adjacent. The scientific literature clearly demonstrates the enhanced hydrologic connectivity that is present between a tributary and waters within the floodplain of that tributary. There is, however, variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone). The agencies request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.

As noted above, the agencies retain the general existing definition of adjacency and have never interpreted the term to include wetlands that are a great distance from a jurisdictional water. The agencies intend to similarly interpret the new definition of "neighboring." This new definition is designed to provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters, but the agencies request comment for additional clarification. Commenters should support where possible from scientific literature any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval.

The agencies seek comment on specific options for establishing additional precision in the definition of "neighboring" through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters.

Finally, the agencies are also proposing to delete the parenthetical from the existing "adjacent wetlands" regulatory provision The phrase "other than waters that are themselves wetlands" was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to another wetland (such as an "isolated" wetland, as opposed to a wetland adjacent to a tributary). However, in practice some wetlands that were indeed adjacent to a tributary were found to not meet the definition of "adjacent" simply because another adjacent wetland was located between the adjacent wetland and the tributary. With this proposed change, the agencies intend to ensure that all waters that meet the proposed definition of "adjacent" are "waters of the United States," regardless of whether or not another adjacent water is located between those waters and the tributary.

If, for example, one wetland is in the riparian area of a "tributary" as defined in today's proposed rule, and a different wetland is in the floodplain of that tributary, both wetlands would meet the definition of "adjacent" and be "waters of the United States," even if the riparian wetland is located between the floodplain wetland and the tributary. Waters located near an adjacent water but which are not themselves (independently) adjacent to an (a)(1) through (a)(5) water would, under the proposed rule, not be regulated under (a)(6). However, waters, including wetlands, that are adjacent to a wetland that meets the definition of a tributary would be considered adjacent waters.

2. Why do the agencies conclude that adjacent waters are "waters of the United States?"

a. Legal Basis for Defining All Adjacent Waters as "Waters of the United States"

For those wetlands adjacent to traditional navigable waters, Justice Kennedy stated in *Rapanos* that the agencies' existing regulation "rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 547 U.S. at 780. For all other adjacent waters, including adjacent wetlands, Justice Kennedy has provided a framework for establishing categories of waters which are *per se* "waters of the United States." First, he provided that wetlands are jurisdictional if they "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. While the issue was not before the Supreme Court, it is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is the touchstone for CWA jurisdiction. Justice Kennedy also stated that the agencies could through regulation or adjudication identify categories of waters that "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 547 U.S. at 780–81.

Adjacent waters as defined in today's proposed rule, alone or in combination with other adjacent waters in a watershed that drain to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, or biological integrity of those waters. Waters that are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of stream networks because of their ecological functions and how they interact with each other, and with downstream traditional navigable waters, interstate waters, or the territorial seas. In other words, tributaries and their adjacent waters, and the traditional navigable waters,

interstate waters, and territorial seas to which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into these components of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, and biological integrity of these waters.

The agencies' proposed rule is consistent with the statute, the Supreme Court's decisions, the best available science, and scientific and technical expertise. See both Appendices A and B.

b. Adjacent Waters Under This Proposed Rule Have a Significant Nexus to (a)(1) Through (a)(3) Waters

The agencies' proposal to determine "adjacent waters" to be jurisdictional by rule is supported by the substantial chemical, physical, and biological relationship between adjacent waters, alone or in combination with similarly situated waters, and (a)(1) through (a)(5) waters. Adjacent wetlands and other adjacent waters such as ponds and oxbow lakes perform important functions for the nearby streams and lakes, and these functions are significant for the chemical, physical, and biological integrity of adjacent and downstream waters. *See* Appendix A.

One reason why the agencies propose in this rulemaking that all adjacent waters have a significant nexus with their traditional navigable waters, interstate waters, or the territorial seas is closely related to a primary reason (explained above) why all tributaries of navigable and interstate waters have a significant nexus with those waters. That is, all adjacent waters should be jurisdictional by rule because the discharge of many pollutants (such as nutrients, petroleum wastes and other toxic pollutants) into adjacent waters often flow into and thereby pollute the traditional navigable waters, interstate waters, and the territorial seas.

Based on science and agency expertise, the agencies conclude that adjacent waters, as defined in the proposed rule, "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 781–82. The agencies identified the characteristics of adjacent waters that as a class have a significant nexus to (a)(1) through (a)(3) waters: They are waters that are bordering to or are contiguous with (a)(1) through (a)(5) waters, including wetlands; they are waters that lie within the riparian area or floodplain of (a)(1) through (a)(5) waters; or they are waters that have a shallow subsurface or confined surface hydrologic connection with (a)(1) through (a)(5) waters. These characteristics ensure that the adjacent waters are part of "an aquatic system incorporating navigable waters," 547 U.S. at 781–82; and that they perform important functions to maintain the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters.

In showing chemical, physical, and biological connections between adjacent waters and other jurisdictional waters, adjacent waters, including wetlands, may be separated by land or other features not regulated under the CWA, but those intervening uplands do not eliminate or impede the functional interactions between (a)(1) through (a)(5) waters and the waters, including wetlands, that are adjacent to them. For instance, two waters may be separated by upland but be connected through surface or shallow subsurface connections with water and chemicals readily exchanging between them. Similarly, uplands separating two waters may not act as a barrier to species that rely on and that regularly move between the two waters. Therefore, the proposed rule reflects an understanding that adjacent waters affect the chemical, physical, and biological integrity of waters to which they are adjacent and to (a)(1) through (a)(3) waters even where the two waters may be separated by features that are not jurisdictional, such as uplands, berms, roads, levees, and similar features. The presence of these features does not extinguish jurisdiction, a conclusion contained in the agencies' existing regulation at 33 CFR 328.3(c).

(1) Riparian and Floodplain Waters Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters

Riparian and floodplain waters, including wetlands, that are adjacent to (a)(1) through (a)(3) waters play an integral role in maintaining the chemical, physical, and biological integrity of those waters. In addition, riparian and floodplain waters, including wetlands, that are adjacent to (a)(4) and (a)(5) waters provide an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Among the ways in which riparian and floodplain waters, including wetlands, that are adjacent to (a)(4) and (a)(5) waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas is by significantly affecting the chemical, physical, and biological integrity of the (a)(4) and (a)(5) waters to which they are adjacent, and those waters in turn significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

(2) Waters, Including Wetlands, Determined To Have a Confined Surface or a Shallow Subsurface Hydrologic Connection Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters.

The proposed rule includes as adjacent those waters that are "neighboring" because they possess a shallow subsurface or confined surface hydrologic connection to a jurisdictional water, and therefore can exchange water, along with chemicals and organisms within that water, with an (a)(1) through (a)(5) water, and subsequently have a significant effect, particularly in combination with other adjacent waters in the watershed, on the chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, and the territorial seas.

Confined surface connections that provide a discrete pathway for water to be exchanged between the potentially adjacent wetland or water and an (a)(1) through (a)(5) water present the clearest evidence of a hydrologic connection. Shallow subsurface connections are also relevant, yet are more difficult to identify and document. Evidence shows that waters, including wetlands, located outside of the riparian area or floodplain, but which still have a shallow subsurface or confined surface hydrologic connection to an (a)(1) through (a)(5) water, will have a significant nexus to downstream (a)(1) through (a)(3) waters. Note that nothing under the proposed rule would cause the shallow subsurface connections themselves to become jurisdictional.

Examples of confined surface water hydrologic connections that demonstrate adjacency are swales, gullies, and rills. The frequency, duration, and volume of flow associated with these confined surface connections can vary greatly depending largely on factors such as precipitation, snowmelt, landforms, soil types, and water table elevation. It is the presence of this hydrologic connection which provides the opportunity for neighboring waters to influence the chemical, physical, or biological integrity of (a)(1) through (a)(5) waters.

In circumstances where a particular water is outside of the floodplain and riparian area of a jurisdictional water, a connection can be established by confined surface or shallow subsurface

hydrology that makes the water neighboring, and thus adjacent. The scientific literature recognizes the role of hydrologic connections in supporting a substantial chemical, physical, or biological relationship between water bodies, but this relationship can be reduced as the distance between water bodies increases because of various factors, such as soil characteristics, geology, climate, precipitation patterns, etc. The distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination. The greater the distance, the less likelihood that there is an actual shallow subsurface or confined surface hydrologic connection, because of the greater potential for the water to infiltrate the soil to deeper groundwater, or for transmission losses in any gully or swale (for example) that may appear to be hydrologic connections. Within a watershed, wetlands and open waters that are closer to tributaries will have a higher probability of being hydrologically connected and of being determined adjacent than more distant waters, assuming that conditions governing type and quantity of flows (e.g., slope, soil, and aquifer permeability) are similar. Report at 5–2. A determination of adjacency based on shallow subsurface or confined surface hydrologic connection outside the riparian area or floodplain requires clear documentation.

H. "Other Waters"

The "other waters" paragraph of the proposed rule is at (a)(7). To be clear, these "other waters" are not jurisdictional as a single category; rather, as the proposed rule language states, "other waters" are jurisdictional provided that they are found, on a case-specific basis, to have a significant nexus to an (a)(1) through (a)(3) water. Thus, the introductory phrase "on a case-specific basis" is designed to signal clearly that this provision of the definition of "waters of the United States" does not mean "other waters" are "waters of the United States" by definition in the same way as those defined as jurisdictional in proposed paragraphs (a)(1) through (a)(6).

"Other waters" will be evaluated either individually, or as a group of waters where they are determined to be similarly situated in the region. Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. How these "other waters" are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the "region" or watershed. For other waters that perform similar functions, their landscape position within the watershed (i.e., the "region") relative to each other or to a jurisdictional water is generally the determinative factor for aggregating waters in a significant nexus analysis, which will focus on the degree to which the functions provided by those "other waters" affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters and whether such effects are significant. *See* Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.C; Part II, iii) and Appendix B, Legal Analysis.

Significant nexus is proposed to be defined to mean that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (a)(3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3).

Other waters with a significant nexus can be found to be jurisdictional on a case-specific basis where these waters do not fit within the definition of another of the proposed categories of "waters of the United States" under paragraphs (a)(1) through (a)(6) and are not excluded from the definition of "waters of the United States" under proposed section (b).

A significant nexus analysis may be based on a particular water alone or based on the effect that the water has in combination with other similarly situated waters in the region. Where effects will be analyzed in combination, the agencies will aggregate those effects. The agencies propose to interpret the "region" within which similarly situated waters would be aggregated as the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas.

For purposes of analyzing whether an "other water" has a significant nexus, the agencies are proposing that "other waters" are similarly situated if they perform similar functions and they are either (1) located sufficiently close together so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3), or (2) located sufficiently close to a "water of the United States" for such an evaluation of their effect. These criteria are explained in a subsequent section.

Consistent with Justice Kennedy's opinion in *Rapanos,* the agencies propose today and are soliciting comment on establishing a case-specific analysis of whether "other waters," including wetlands, that do not meet the criteria for any of the proposed jurisdictional categories in (a)(1) through (a)(6) and are not proposed to be excluded by rule under section (b), are susceptible to a case-specific analysis of whether they alone, or in combination with other similarly situated waters, have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas, and therefore are "waters of the United States."

1. Significant Nexus Analysis for "Other Waters"

a. "Other Waters"

"Other waters" are those waters, including wetlands, that are subject to a case-specific significant nexus determination, and do not meet the criteria of any of the categories of waters in (a)(1) through (a)(6), and also are not one of the waters and features excluded from the definition of "waters of the United States" in section (b). In the existing regulation, there is a non-exclusive list of the types of "other waters" which may be found to be "waters of the United States." The agencies do not propose to re-promulgate this list of "other waters" because it is unnecessary and has led to confusion where it has been incorrectly read as an exclusive list.

Of additional concern was that the existing descriptive list of types of "other waters" includes some waters that would be jurisdictional under one of the proposed categories of "waters of the United States" that would be jurisdictional by rule, such as tributary streams. The agencies want to avoid questions of whether an intermittent stream that meets the definition of tributary also needs a separate significant nexus analysis. Under the proposed rule, that tributary stream does not require the significant nexus analysis. Removing the list of water

types does not imply that any of the waters listed in the existing regulation are never jurisdictional under the proposed rule. When one of the waters on the current enumerated list does not fall under a proposed category for jurisdiction (for example, adjacent waters under (a)(6) or tributaries under (a)(5)), those waters would be jurisdictional if found to have a significant nexus under proposed paragraph (a)(7) on a case-specific basis.

b. Significant Nexus

The agencies recognize that Supreme Court decisions in *SWANCC* and *Rapanos* placed limits on the scope of "other waters" that may be determined to be jurisdictional. Therefore, the agencies' proposal today provides that waters not determined to be jurisdictional as a category are jurisdictional only if they are determined on a case-specific basis to have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. The agencies also request comment and information below on how the science could support other approaches that could provide greater regulatory certainty regarding the jurisdictional status of "other waters", including expanding the list of waters jurisdictional by rule, expanding the list of waters not jurisdictional by rule, and narrowing the "other waters" subject to a case-specific analysis, including eliminating the case-specific analysis where the science does not support it. The agencies will review the administrative record, including comments received, the scientific literature, and the final Report, in determining how to address "other waters" in the final rule.

Justice Kennedy explained the *SWANCC* decision in his concurring opinion in *Rapanos:* "In *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." 547 U.S. at 759. The agencies interpret the significant nexus standard to apply to the "other waters" portion of the existing regulation since the Court in *SWANCC* was considering the validity of the Corps' assertion of jurisdiction over ponds and mudflats under (a)(3) of the Corps' regulations (33 CFR 328.3).

To comport with the *SWANCC* and *Rapanos* decisions, the agencies propose to delete the requirement that an "other water" be one the use, degradation or destruction of which could affect interstate or foreign commerce and to replace it with the requirement that the "other water" meet Justice Kennedy's significant nexus standard. The current regulations assert jurisdiction more broadly than what is proposed today. With this proposed regulation, the agencies would limit jurisdiction over "other waters" to only those that are determined on a case-specific basis to have a significant nexus to an (a)(1) through (a)(3) water.

For purposes of assessing whether a particular water is a "water of the United States" because it, alone or in combination with other similarly situated waters, has a significant nexus to an (a)(1) through (a)(3) water, the agencies are proposing to define "significant nexus" plus each of the key elements used in the definition of "significant nexus."

i. In the Region

The agencies propose to interpret the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. That concept is reflected in the definition of "significant nexus" at (c)(7). Since Justice Kennedy did not define the "region," the agencies determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of these systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate extent on which to identify waters that together may have an effect on the chemical, physical, or biological integrity of a particular (a)(1), through (a)(3) water. *See* Appendix A, Scientific Evidence (Part I, Background; Part II, 4, iii, A).

The agencies choose to use the single point of entry watershed as the appropriate scale for the region. A single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea. There will likely be other traditional navigable waters, interstate waters, and ultimately the territorial seas further downstream from the "nearest" such water, and these further downstream waters would likely have larger watersheds, but the agencies determined that a reasonable interpretation of "in the region" is the watershed that drains to the nearest (i.e. first downstream) such water. Any nexus between other waters and an (a)(1) through (a)(3) water will be strongest with this nearest such water, and its drainage area is likely to be of a size commonly understood as a "region."

The agencies generally use available mapping tools that are based on the National Hydrography Dataset (NHD) to demarcate boundaries of the single point of entry watershed. This point of entry approach identifies a group of waters that flow to a single location and represents the scientifically appropriate sized area for conducting a significant nexus evaluation in most cases. In the arid West, the agencies recognize there may be situations where the single point of entry watershed is very large, and it may be resource intensive to demarcate watershed boundaries and all relevant waters in the watershed. Under those circumstances, for practical administrative purposes the agencies could use the NHD mapping tool to demarcate catchments surrounding the water to be evaluated that, in combination, are roughly the size of the typical nearby 10 digit hydrologic unit code (HUC 10) watershed. This combination of catchments would be used for conducting a significant nexus evaluation. Such an approach can help resolve some practical concerns about using available mapping tools on very large single point of entry watersheds in the arid West.

The watershed includes all lands, streams, wetlands, lakes, and other waters within its boundaries. Only waters within the watershed that meet standards set out in (a)(1) through (a)(7) of the proposed rule would be considered "waters of the United States." In light of the scientific literature, the longstanding approach of the agencies to implementation of the CWA, and the statutory goals underpinning Justice Kennedy's significant nexus framework, the watershed draining to the nearest (a)(1) through (a)(3) water is the appropriate "region" for a significant nexus analysis.

ii. Similarly Situated

Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The proposed rule adopts the concept of the "alone or in combination with similarly situated waters" test.

The proposed regulation in the definition of "significant nexus" at (c)(7) clarifies that other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) This combination of functionality and proximity to each other or to a "water of the United States" meets the standard provided by Justice Kennedy. Examining both functionality and proximity also limits the "other waters" that can be aggregated for purposes of determining jurisdiction.

It is appropriate to analyze the chemical, physical, or biological effects "other waters" perform individually or together with all similarly situated "other waters" in the region under Justice Kennedy' s standard. Today, the agencies are proposing to identify factors to apply in the determination of when "other waters" should be considered either individually or as a single landscape unit for purposes of a significant nexus analysis. The agencies propose that "similarly situated" requires an evaluation of either a single water or group of waters (i.e., a single landscape unit) in the region that can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

In addition, the agencies propose that "other waters" located close to a jurisdictional water are more likely to influence such waters and therefore, to affect the integrity of downstream (a)(1) through (a)(3) waters. These "other waters," which do not meet the proposed definition of adjacent waters, may be assessed together when determining on a case-specific basis whether a significant nexus exists, because of their similar functions and similar location in the landscape.

Similarly situated waters may be identified as sufficiently close together for purposes of this paragraph of the proposed regulation when they are within a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.). As a general matter, it would be inappropriate, for example, to consider "other waters" as "similarly situated" if these "other waters" are located in different landforms, have different elevation profiles, or have different soil and vegetation characteristics, unless the "other waters" perform similar functions and are located sufficiently close to a "water of the United States" to allow them to consistently and collectively function together to affect an (a)(1) through (a)(3) water. In determining whether other waters are sufficiently close to each other or to a water of the United States, the agencies would also consider hydrologic connectivity to each other or a jurisdictional water.

In determining whether groups of other waters perform "similar functions" the agencies would also consider functions such as habitat, water storage, sediment retention, and pollution sequestration. These and other relevant considerations would be used by the agencies to document the hydrologic, geomorphic and ecological characteristics and circumstances of the waters. Examples include: documentation of chemical, physical, and biological interactions of the similarly situated "other waters;" aerial photography; topographical or terrain maps and information; other available geographic information systems (GIS) data; National Wetlands Inventory Maps; and state and local information. The evaluation would use any available site information and pertinent field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been completed in the region.

Under the proposed rule, the agencies would assess the combined effects of similarly situated "other waters" in the region on the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters in conducting a significant nexus analysis. The factors identified above would be used by the agencies in determining "other waters" in the region that are similarly situated and should, therefore, be considered together in conducting a significant nexus analysis. The agencies recognize that consideration of these factors will often limit aggregation of "other waters" for purposes of assessing significant nexus or will require that "other waters" be considered individually with no aggregation.

iii. Significant Nexus

The agencies propose to define the term "significant nexus" consistent with language in *SWANCC* and *Rapanos*. The proposed definition recognizes that not all waters have this requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional. Justice Kennedy was clear that waters with a significant nexus must significantly affect the chemical, physical, or biological integrity of a downstream navigable water and that the requisite nexus must be more than "speculative or insubstantial," *Rapanos*, at 780, and the agencies propose to define significant nexus in precisely those terms.

It is important to note that in *Rapanos*, Justice Kennedy did not conclude that the wetlands adjacent to tributaries in the cases before the Court were not "waters of the United States." Rather, Justice Kennedy concluded that the proper inquiry to determine their jurisdictional status—whether or not the wetlands had a "significant nexus"—had not been made by the Corps or the courts below. Justice Kennedy stated that in both the consolidated cases before the Court the record contained the types of evidence relevant to the determination of a significant nexus according to the principles he identified. Justice Kennedy stated "[m]uch the same evidence should permit the establishment of a significant nexus with navigable in fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected." *Id.* Thus, Justice Kennedy concluded that "the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid." *See* Appendix B, Legal Analysis.

The agencies will determine whether the water they are evaluating, in combination with other similarly situated waters in the region, has a significant nexus to the nearest traditional navigable water, interstate water or the territorial seas. Functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. A hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water, interstate water or the territorial seas. These functional relationships include retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water or the territorial seas. *See* 547 U.S. at 775 (citations omitted) (J. Kennedy) ("it may be the absence of an interchange of waters prior to the dredge and fill activity that

makes protection of the wetlands critical to the statutory scheme"). For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. Report at 5–26 (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)).

When evaluating an "other water" individually or cumulatively for the presence of a significant nexus to an (a)(1) through (a)(3) water, there are a variety of factors that can be considered that will influence the chemical, physical, or biological connections the "other water" has with the downstream (a)(1) through (a)(3) water. The likelihood of a significant connection is greater with increasing size and decreasing distance from the identified (a)(1) through (a)(3) water, as well as with increased density of the "other waters" for "other waters" that can be considered in combination with similarly situated waters.

Evidence of chemical connectivity and the effect on waters can be found by identifying: Whether the properties of the water in question are similar or dissimilar to an identified (a)(1) through (a)(3) water; signs of retention, release, or transformation of nutrients or pollutants; and the effect of landscape position on the strength of the connection to the nearest "water of the United States," and through it to an (a)(1) through (a)(3) water. In addition, relevant factors influencing chemical connectivity include hydrologic connectivity (see physical factors, below), surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (e.g. acidic deposition).

Evidence of physical connectivity and the effect on (a)(1) through (a)(3) waters can be found by identifying evidence of physical connections, such as flood water or sediment retention (flood prevention). Presence of indicators of hydrologic connections between the other water and jurisdictional water are also indictors of a physical connection. Factors influencing physical connectivity include rain intensity, duration of rain events or wet season, soil permeability, and distance of hydrologic connection between the "other water" and the (a)(1) through (a)(3) water, depth from surface to water table, and any preferential flowpaths.

Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi-aquatic species present in the "other water" and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the "other water," and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the "other water." Factors influencing biological connectivity include species' life history traits, species' behavioral traits, dispersal range, population size, timing of dispersal, distance between "other water" and an (a)(1) through (a)(3) water, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for purposes of this rule.

When making a jurisdictional determination for an "other water," the administrative record will include available information supporting the determination. In addition to location and other descriptive information regarding the water at issue, the record will include a clear explanation of the rationale for the jurisdictional conclusion and a description of the information used to determine whether the "other water" has a significant nexus. Information relevant to a finding that an "other water" alone or in combination with similarly situated "other waters" in the region can come from many sources. Such information need not always be specific to the water whose jurisdictional status is being evaluated. Regional and national studies of the same type of water or similarly situated waters can help to inform a significant nexus analysis as long as they are applicable to the water being evaluated. Information derived from field observation is not required in cases where a "desktop" analysis can provide sufficient information to make the requisite findings. However, for more complex or difficult jurisdictional determinations, it may be helpful to supplement such information with field observation.

The agencies solicit comment regarding this approach to "other waters," recognizing that a case-specific analysis of significant nexus is resource-intensive for the regulating agencies and the regulated community alike. In addition, the agencies solicit comment on additional scientific research and data that might further inform decisions about "other waters." In particular the agencies solicit information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of "other waters," either alone or in combination with similarly situated waters, that can appropriately be identified as always lacking or always having a significant nexus.

iv. Additional Request for Public Comment on "Other Waters"

As stated above, significant goals of the agencies in developing this proposed rule are to provide greater clarity, certainty, and predictability to the public as to what waters are and are not subject to the jurisdiction of the CWA. The agencies will achieve these goals consistent with the CWA, as interpreted by the Supreme Court, and as supported by the best available science. The agencies also will fulfill their responsibility to the CWA's objectives and policies to protect water quality, public health, and the environment.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as "other waters." This proposal is for a case-specific analysis of whether "other waters," including wetlands, alone, or in combination with other similarly situated waters located in the same region, have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. The agencies make this proposal based on an analysis of the current state of the science available to them. In this proposal, the agencies continue to solicit additional science (peer-reviewed whenever possible) that could lead to greater clarity, certainty, and predictability of which waters are and are not within the jurisdiction of the CWA.

To best meet their goals and responsibilities, the agencies solicit comment and information on the state of the science, and its relation to the CWA and the caselaw, to determine if there are opportunities to provide greater clarity, certainty, and predictability for establishing jurisdiction over "other waters." This includes the possibility of determining that additional waters should be jurisdictional by rule such as in paragraphs (a)(1) through (a)(6), and the possibility that additional waters should be excluded from jurisdiction by rule such as in section (b). The agencies' decision on how best to address jurisdiction over "other waters" in the

final rule will be informed by the final version of the Report and other available scientific information.

The agencies request public comment on whether these alternative approaches present options for determining the jurisdictional status of "other waters" that could rely less, or not at all, on case-specific analysis of whether waters are similarly situated for conducting a significant nexus analysis. Possible alternative options to the case-specific determination in the "other waters" proposal are described below. The agencies might adopt any combination of today's "other waters" proposal and the alternative options for the final rule, after considering public comment and the evolving scientific literature on connectivity of waters.

The agencies solicit comment on how the agencies propose to find "other waters" to be similarly situated in this proposed rule, whether other methods of identifying similarly situated "other waters" would be reasonable, and whether no "other waters" should be determined to be similarly situated. In each instance, the comments should address how the actions of the agencies would be consistent with the science, including any science not currently before the agencies, the CWA, and the caselaw.

The agencies considered multiple approaches and options for how best to address whether "other waters" were jurisdictional under the CWA. In addition to the case-specific analysis in the proposal, the agencies seek comment on the following alternatives:

1. Determine by rule that "other waters" are similarly situated in certain areas of the country.

The case-specific analysis in the proposed rule approaches the question of what "other waters" are similarly situated for purposes of aggregation in the same manner throughout the U.S. The agencies could determine by rule that "other waters" are similarly situated in only certain areas of the country, and not in other areas. Under this option, the agencies would identify ecological regions (ecoregions) which contain "other waters" that are "similarly situated" as provided in the proposed rule. Where waters are determined to be similarly situated, those waters are aggregated for evaluation of whether they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. The agencies expect that determining all "other waters" within an ecoregion to be similarly situated would result in these "other waters" being determined to have a significant nexus and being found jurisdictional.

Waters not located in these identified ecoregions or other specified areas would be determined to not be similarly situated and their effects would not be aggregated for purposes of a significant nexus determination. The result of not finding waters to be similarly situated would most likely be a finding of no significant nexus and no jurisdiction. The agencies particularly seek comment on whether the science supports differing approaches with respect to which "other waters" are similarly situated in certain areas of the U.S based on distinguishing factors in those areas.

The agencies also request comment on factors that could lead "other waters" to be aggregated in some areas but analyzed individually in other areas for purposes of informing a case-specific significant nexus analysis. The agencies request comment on whether some resource types are more or less likely to be similarly situated than others, and if there are ways to identify regions within which aggregation of "other waters" would be routinely applied rather than a case-specific determination. The agencies also request comment about whether "other waters" that are not found in identifiable mapped regions should be analyzed individually on a case-specific basis for a significant nexus, aggregated in some other way for a significant nexus analysis, or categorically excluded from jurisdiction.

An ecoregion is an area within the United States that includes generally similar ecosystems and that has similar types, qualities, and quantities of environmental resources. (J.M. Omernik, "Perspectives on the Nature and Definition of Ecological Regions," *Environmental Management* 34(Supplement 1):S27–S38 (2004)). Ecoregions cover relatively large areas of land or water, and contain characteristic, geographically distinct assemblages of natural communities and species. The biodiversity of flora, fauna and ecosystems that characterize an ecoregion tends to be distinct from that of other ecoregions. (*Id.*)

Level III ecoregions are the second most detailed level of ecoregions nationally, with 105 Level III ecoregions in the conterminous United States, and have been refined over the years in several state-level projects conducted in collaboration with the EPA and other Federal and State agencies. U.S. Environmental Protection Agency, "Level III Ecoregions of the Continental United States," map scale 1:7,500,000 (Corvallis, OR: U.S. EPA—National Health and Environmental Effects Research Laboratory, 2013), available at *http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm*. For this reason, the agencies consider Level III ecoregions to be the most appropriate level for analysis. The "other waters" in these ecoregions are within a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.), and generally provide similar functions to the downstream traditional navigable waters, interstate waters, or the territorial seas. A possible list of Level III ecoregions where waters are similarly situated and aggregation could be used include:

1. Coast Range
4. Cascades
6. Central California Foothills and Coastal Mountains
7. Central California Valley
8. Southern California Mountains
9. Eastern Cascades Slopes and Foothills
10. Columbia Plateau
27. Central Great Plains
34. Western Gulf Coastal Plain
42. Northwestern Glaciated Plains
44. Nebraska Sand Hills
46. Northern Glaciated Plains
47. Western Corn Belt Plains
48. Lake Agassiz Plain
50. Northern Lakes and Forests
51. North Central Hardwood Forests
59. Northeastern Coastal Zone
63. Middle Atlantic Coastal Plain
65. Southeastern Plains
75. Southern Coastal Plain
78. Klamath Mountains/California High North Coast Range
81. Sonoran Basin and Range
83. Eastern Great Lakes Lowlands
84. Atlantic Coastal Pine Barrens
85. Southern California/Northern Baja Coast

See Map A in docket.

The agencies would consider the "other waters" in a single point of entry watershed in these identified ecoregions as similarly situated for purposes of aggregation for a significant nexus analysis. The agencies expect that this approach would lead to all similarly situated other waters within single point of entry watersheds within an ecoregion being found jurisdictional through case-specific analysis of significant nexus. Alternately, the agencies could determine that the similarly situated waters within each ecoregion have a significant nexus and are jurisdictional by rule and therefore do not require a case-specific significant nexus analysis.

The agencies request comment on the list of ecoregions above and whether this list is appropriate, and whether there are other ecoregions or distinct areas that should be included or excluded from this list. This list does not include regions in Alaska or Hawaii and the agencies request comment on

appropriate regions to use to analyze "other waters" in those states. The agencies also request comment on whether using Level III ecoregions is appropriate or whether a finer gradation of ecoregions would be more appropriate.

The factors the agencies used in developing the list above are:

a. Density of "other waters" such that there can be periodic surface hydrologic connections among the waters, for example in West Coast vernal pools.

b. Soil permeability and surface or shallow subsurface flow such that the "other waters" can be considered hydrologically connected, such as many Texas coastal prairie wetlands.

c. Water chemistry which indicates that the "other waters" are part of the same system and influenced by the same processes.

d. Physical capacity of "other waters" to provide flood and sediment retention; this is a case where several small wetlands together may have a different effect than a single large wetland providing the same function, for example prairie potholes in the Missouri Coteau.

e. Co-location of waters to each other or similarly to the tributary system such that their cumulative and additive effects on pollutant removal through parallel, serial, or sequential processing are apparent, such as the role of pocosins in maintaining water quality in estuaries.

f. "Other waters" that are sufficiently near each other or the tributary system and thus function as an integrated habitat that can support the life cycle of a species or more broadly provide habitat to a large number of a single species.

The agencies request comment on the factors above and whether this list of factors is appropriate, and whether there are other factors that should be included or excluded from this list. Comments should address the science that supports each comment.

In addition to ecoregions, another method of mapping boundaries where waters could be considered to be similarly situated for a significant nexus analysis would be to rely on hydrologic landscape regions. Hydrologic landscape regions are groups of watersheds that are clustered together on the basis of similarities in land-surface form, geologic texture, and climate characteristics. (D.M. Wolock, *et al.* "Delineation and Evaluation of Hydrologic-Landscape Regions in the United States Using Geographic Information System Tools and Multivariate Statistical Analyses," *Environmental Management* 34(Supplement 1):S71–S88 (2004)). Hydrologic-landscape regions are based on a concept that reflects fundamental hydrologic processes that are expected to affect water quality and other environmental characteristics.

The agencies seek comment on the technical bases for using ecoregions and hydrologic-landscape regions under this option. Commenters may also address whether some other method or combination of methods (certain ecoregions and hydrologic-landscape regions, for example) of mapping geographic boundaries is better supported by the science. Comments should also address whether and how this option is consistent with the science and the caselaw.

If the agencies choose to determine by rule that "other waters" in certain ecoregions or other geographic boundaries are similarly situated, the agencies could also determine that waters not located in identified ecoregions or otherwise specifically identified areas are not similarly situated for purposes of establishing a significant nexus and jurisdiction. The agencies also request comment on whether "other waters" that are not found in identifiable mapped ecoregions or other areas should be analyzed individually on a case-specific basis for determining a significant nexus, and on whether or not case-specific analysis of whether there are similarly situated "other waters" in the area is advisable.

2. Determine by rule that certain additional subcategories of waters would be jurisdictional rather than addressed with a case-specific analysis, and that other subcategories of waters would be non-jurisdictional.

The agencies could choose to determine that there is science available to determine by rule that certain additional subcategories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule rather than addressed with a case-specific significant nexus analysis under paragraph (a)(7). Such an approach would lead to certain subcategories of "other waters" being determined jurisdictional in the same way that waters under paragraphs (a)(1) through (a)(6) are jurisdictional without a case specific significant nexus analysis. Under this option the agencies could determine that waters such as prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools, and perhaps other categories of waters, either alone or in combination with other waters of the same type in a single point of entry watershed, have a significant nexus and are jurisdictional by rule. *See* Appendix A, Part II, iii.C(1). These waters would not require a case-specific significant nexus analysis to determine jurisdiction.

In addition, the agencies could determine that other subcategories of waters are not jurisdictional and lack a significant nexus to an (a)(1) through (a)(3) water. Under this option the agencies could conclude that "other waters" such as playa lakes in the Great Plains, even in combination with other playa lakes in a single point of entry watershed, lack a significant nexus and therefore are not jurisdictional. *See* Appendix A, Part II, iii.C(1).

Under this approach, where a playa lake, or other excluded category of water, would be within a category established by paragraphs (a)(1) through (a)(6) of the proposed rule (*e.g.,* the playa is an interstate water or the playa is adjacent to an (a)(1) through (a)(5) water), the playas would be jurisdictional. (*See* R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003); M.G. Forbes, et al., "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," Wetlands 32(4): 705–715 (2012)).

The agencies seek comment on how they should categorize the remaining "other waters." The agencies seek comment on whether these remaining "other waters" should be non-jurisdictional because they would lack a significant nexus to a traditional navigable water, interstate water, or the territorial seas.

There is substantial value to the regulated public and all other stakeholders in providing increased certainty regarding which "other waters" are jurisdictional and which are not. By expanding the categories of waters determined jurisdictional and expanding the categories of waters not categorized as jurisdictional, the agencies can better address the clarity, certainty, and predictability goals of this rule. However, the agencies acknowledge that the science may not be sufficient today to conclusively determine whether all categories of other waters significantly affect the chemical, physical and biological integrity of (a)(1) through (a)(3) waters. The agencies seek comment on the science used in support of the proposed rule, plus any additional science they should consider when determining jurisdiction. The agencies also seek comment on how inconclusiveness of the science relates to the use of case-specific determinations. As the science develops, the agencies could determine

that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.

If waters are categorized as non-jurisdictional because of a lack of science available today, the agencies request comment on how to best accommodate evolving science in the future that could indicate a significant nexus for these "other waters." Specifically, the agencies request comment as to whether this should be done through subsequent rulemaking, or through some other approach, such as through a process established in this rulemaking.

The agencies also seek comment on how the science supports retaining the case-specific determination for the remaining "other waters" that are neither specifically included nor excluded from jurisdiction. Retaining the case-specific analysis for these other waters would not enhance clarity of jurisdiction for these other waters, but it would retain the ability for a jurisdictional determination consistent with the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In the alternative, the agencies seek comment on whether it would be appropriate to categorize remaining "other waters" as not jurisdictional. The agencies specifically seek comment on how these "other waters" should be considered.

3. Additional "other waters" approaches.

The agencies request comment on additional "other waters" approaches considered, but not proposed by the agencies.

The agencies could determine that no "other waters" are similarly situated, and all significant nexus analyses would be made on a case-specific basis for each individual "other water." The agencies expect that this likely would result in few if any other waters being found jurisdictional. The agencies recognize that if they determine there are no similarly situated "other waters," there are issues about consistency with existing scientific information and studies regarding the functional relationship of "other waters" of the same type, and their contribution to the chemical, physical, or biological integrity of streams, rivers, lakes, and similar waters. There are also questions of how finding no "other waters" to be similarly situated reconciles with the portion of Justice Kennedy's opinion discussing "similarly situated" waters in the region that "significantly affect" the chemical, physical, or biological integrity of waters more traditionally understood as navigable. While the agencies do not propose to determine that no "other waters" are similarly situated and aggregated, the agencies specifically seek comment on whether and how choosing to find no "other waters" similarly situated would be consistent with the science, the CWA, and the caselaw.

The agencies also considered and seek comment on all "other waters" in a single point of entry watershed being evaluated as a single landscape unit with regard to their effect on traditional navigable waters, interstate waters, and the territorial seas.

The agencies seek comment that would inform a decision that these "other waters" in a single point of entry watershed perform similar functions and are located sufficiently close together or to a paragraph (a)(1) through (a)(5) water so that they can be aggregated and evaluated as a single landscape unit with regard to their effects on the nearest (a)(1) through (a)(3) water. Generally, the agencies anticipate that if the other waters in a single point of entry watershed are aggregated as a single unit, these waters would be determined to have a significant nexus and be jurisdictional.

The agencies recognize that if they choose to aggregate all other waters in a single point of entry watershed, there likely is insufficient existing scientific information to support the determination that all "other waters" in watersheds across the nation are similarly situated as provided in this rule and described in the caselaw. There are also questions of how determining "other waters" in a single point of entry watershed to be similarly situated reconciles with the portion of Justice Kennedy's opinion discussing "similarly situated" waters in the region that "significantly affect" the chemical, physical, or biological integrity of waters more traditionally understood as navigable. While the agencies do not propose to determine that "other waters" in a single point of entry watershed are similarly situated and aggregated, the agencies seek comment on whether and how choosing to find such "other waters" similarly situated would be consistent with the science, the CWA, and the caselaw.

The agencies' determination will be informed by the final version of the Report and other available scientific information.

I. Waters That Are Not "Waters of the United States"

The agencies' longstanding regulations exclude waste treatment systems designed to meet the requirements of the CWA and prior converted cropland from the definition of "waters of the United States." The agencies propose no changes to these exclusions and therefore they would continue as a part of this rulemaking. The agencies also propose to codify for the first time longstanding practices that have generally considered certain features and types of waters not to be "waters of the United States." Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Under today's proposal, the waters identified in section (b) as excluded would not be "waters of the United States,", even if they would otherwise fall within one of the categories in (a)(1) through (a)(7).

The agencies propose ministerial actions with respect to the placement of the two existing exemptions for waste treatment systems and prior converted cropland. They will be in proposed new section (b). For the waste treatment systems exclusion, the agencies propose to delete a cross-reference in the current language to an EPA regulation that is no longer in the Code of Federal Regulations. The parenthetical to be deleted states: "(other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition)." The agencies do not consider this deletion to be a substantive change to the waste treatment systems exclusion or how it is applied. In fact, the agencies do not propose to make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion. The regulations implementing the various CWA programs were promulgated and amended at different times and therefore there are some differences in language. For example, compare EPA's regulations for the section 402 program, 40 CFR 122.2 with the Corps' regulations for the 404 program, 33 CFR 328.3. The agencies do not propose to address the substance of the waste treatment system exclusion and thus will leave each regulation as is with the exception of deleting the cross-reference.

In addition, this regulation does not address or change in any way the many

statutory exemptions from CWA permitting requirements. The proposed rule does not affect any of the exemptions provided by CWA section 404(f), including those for normal farming, silviculture, and ranching activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. The proposed rule also does not address or change the statutory and regulatory exemptions from NPDES permitting requirements such as those for agricultural stormwater discharges, return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1) (exempting discharges composed entirely of return flows from irrigated agriculture from section 402 permit requirements); CWA section 502(14)(excluding agricultural stormwater discharges and return flows from irrigated agriculture from the term point source.); 40 CFR 122.3(f) (excluding return flows from irrigated agriculture from the NPDES program); 40 CFR 122.2 (excluding return flows from irrigated agriculture or agricultural storm water runoff from the term point source.).

Finally, in new paragraphs (b)(3) through (5), the agencies propose, for the first time by rule, to exclude some waters and features that the agencies have by longstanding practice generally considered not to be "waters of the United States." Specifically, the agencies propose that the following are not "waters of the United States" notwithstanding whether they would otherwise be jurisdictional under section (a):

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment.
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - Water-filled depressions created incidental to construction activity;
  - Groundwater, including groundwater drained through subsurface drainage systems; and
  - Gullies and rills and non-wetland swales.

Most of these features and waters have been identified by the agencies as generally not "waters of the United States" in previous preambles or guidance documents. The agencies' have always preserved the authority to determine in a particular case that any of these waters are a "water of the United States." One of the agencies' goals in this proposed rule is to increase clarity and certainty about the scope of "waters of the United States." To that end, the agencies propose not simply that these features and waters are "generally" not "waters of the United States," but that they are expressly not "waters of the United States" by rule. The agencies would not retain the authority to determine that any of these waters was a "water of the United States" because it would otherwise be jurisdictional under section (a). For example, the agencies could not find that a water had a significant nexus and was an "other waters" under paragraph (a)(7), or that it was an interstate water under paragraph (a)(2). These waters would not be jurisdictional by rule.

In determining that these features and waters are not "waters of the United States," the agencies are by the decisions of the Supreme Court. In *Riverside Bayview*, the Supreme Court deferred to the agencies' regulations and noted the difficulty of drawing lines identifying where waters end. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. *See* 547 U.S. at 734. In this section of the proposed rule, the agencies are drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act.

A similar list of waters and features not generally "waters of the United States" was provided by the Corps in a 1986 preamble to the existing rule defining "waters of the United States" (51 FR 41206, 41217, November 13, 1986) and by the EPA in a 1988 preamble (53 FR 20764, June 6, 1988). In today's proposed rule, the agencies have clarified and added to the list in order to provide a full description of the waters that will not be "waters of the United States" by rule. The agencies have never interpreted "waters of the United States" to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems.

In clarifying the list of waters not subject to CWA jurisdiction, the agencies did not include "puddles" from the lists of waters generally not considered jurisdictional in previous preambles or guidance documents. This is not because puddles are considered jurisdictional, it is because "puddles" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood. Because of the lack of common understanding and precision inherent in the term "puddles," the agencies determined that adding puddles would be contrary to the agencies' stated goals of increased clarity, predictability, and certainty. In addition, one commonly understood meaning for the term "puddle" is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies' intent.

Gullies are relatively deep channels that are ordinarily formed on valley sides and floors where no channel previously existed. They are commonly found in areas with low density vegetative cover or with soils that are highly erodible. *See, e.g.*, N.C. Brady and R.R. Weil, *The Nature and Properties of Soils*, 13th Edition (Upper Saddle River, NJ: Prentice Hall, 2002). Rills are formed by overland water flows eroding the soil surface during rain storms. *See, e.g.*, L.B. Leopold, *A View of the River* (Cambridge: Harvard University Press, 1994). Rills are less permanent on the landscape than streams and typically lack an OHWM, whereas gullies are younger than streams in geologic age and also typically lack an OHWM; time has shaped streams into geographic features distinct from gullies and rills. *See, e.g.*, American Society of Civil Engineers, Task Committee on Hydrology Handbook, *Hydrology Handbook* (ASCE Publications, 1996).

The two main processes that result in the formation of gullies are downcutting and headcutting, which are forms of longitudinal (incising) erosion. These actions ordinarily result in erosional cuts that are often deeper than they are wide, with very steep banks, often small

beds, and typically only carry water during precipitation events. The principal erosional processes that modify streams are also downcutting and headcutting. In streams, however, lateral erosion is also very important. The result is that streams, except on steep slopes or where soils are highly erodible, are characterized by the presence of bed and banks and an OHWM as compared to typical erosional features that are more deeply incised. It should be noted that some ephemeral streams are called "gullies" or the like when they are not "gullies" in the technical sense; such streams where they are tributaries under the proposed definition would be considered "waters of the United States," regardless of the name they are given locally. The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

Non wetland natural and man made swales would not be "waters of the United States" under this proposal. In certain circumstances, however, swales include areas that meet the regulatory definition of "wetlands." Swales generally are considered wetlands when they meet the applicable criteria in the *Corps of Engineers Wetland Delineation Manual* and the appropriate regional supplement to that *Wetland Delineation Manual*. Wetland swales would be evaluated as adjacent waters under proposed (a)(6) or as "other waters" under proposed (a)(7) depending upon whether they meet the proposed definition of adjacent. Swales are distinct from streams in that they are non-channelized, shallow trough-like depressions that carry water mainly during rainstorms or snowmelt. Report at A–19. Swales typically lack the OHWM that is characteristic of jurisdictional streams. The agencies request comment on how they could provide greater clarity on how to distinguish swales, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

Finally, under paragraphs (b)(3) and (b)(4), the agencies propose to clearly exempt from the definition of "waters of the United States" two types of ditches: (1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).

The agencies have long distinguished between ditches that are "waters of the United States" and ditches that are not "waters of the United States." In a 1986 Corps preamble and a 1988 EPA preamble, the agencies each stated that they generally do not consider non-tidal drainage and irrigation ditches excavated on dry land to be "waters of the United States." 51 FR 41217, November 13, 1986, 53 FR 20764, June 6, 1988. More recently, the agencies have stated that they generally would not assert jurisdiction over "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." "Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos* v. *United States* and *Carabell* v. *United States*" (Dec. 2, 2008) at 1, 12 (2008 *Rapanos* guidance).

The agencies recognize that there have been inconsistencies in practice implementing agency policy with respect to ditches and this proposed rule is designed to improve clarity, predictability, and consistency. With this proposal, the agencies would no longer rely on "generally not" jurisdictional but would clearly establish that specific types of ditches are not "waters of the United States" by rule. Other ditches not excluded under paragraphs (b)(3) or (b)(4), if they meet the new proposed definition of "tributary" would continue to be "waters of the United States," as they have been under the longstanding implementation of the statute and regulations by the agencies.

The first type of ditch that is excluded needs to meet all three criteria: (1) It is excavated wholly in uplands; (2) it drains only uplands, and (3) it has less than perennial flow. Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water). Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect either directly or through other waters to an (a)(1) through (a)(3) water. The ditch must also contain less than perennial flow to be excluded under this proposed provision. Perennial flow means that the flow in the ditch occurs year-round under normal circumstances; therefore, excluded ditches must be dug only in uplands, drain only uplands, and have ephemeral or intermittent flow. As noted above, the 2008 *Rapanos* guidance stated that the agencies generally would not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." The agencies recognize that the term "relatively permanent" does not align with more commonly understood technical descriptions of flow regime. The agencies therefore believe it is appropriate to clarify the extent of this exclusion using the flow regime terms that are familiar to the public and agency field personnel. The agencies request comment on this formulation of the ditch exclusion. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.

The other type of ditch that would not be a "water of the United States" is a ditch that does not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). Essentially, ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water or territorial sea would not be "waters of the United States."

It is important to note, however, that even when not jurisdictional waters, these non wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a "water of the United States," meeting the proposed definition of "neighboring" because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a "tributary." In addition, these geographic features may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

IV. Related Acts of Congress, Executive Orders, and Agency Initiatives

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, the EPA and the Corps submitted this action to the Office of

Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, the EPA and the Corps of Engineers prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in "Economic Analysis of Proposed Revised Definition of Waters of the United States." A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's CWA section 402 program may be found at 40 CFR 9.1. (OMB Control No. 2040–0004, EPA ICR No. 0229.19). For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, "small entity" is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. See, e.g., *Cement Kiln Recycling Coalition* v. *EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Am. Trucking Ass'n* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *Mid-Tex Elec. Co-op, Inc.* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985).

Under the RFA, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining "waters of the United States"). Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

The proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction will be informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, at a very preliminary stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have also prepared a report summarizing their small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule. This report is available in the docket for this proposed rule (cite).

D. Unfunded Mandates Reform Act

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.

The agencies determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Moreover, the proposed definition of "waters of the United States" applies broadly to CWA programs and the subsequently affected entities, which are not uniquely applicable to small governments. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

This proposed rule seeks to clarify the definition of the extent of CWA jurisdiction established by statute. State and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. Forty-six states and the Virgin Islands have been authorized to administer the NPDES program under section 402, while two states administer the section 404 program. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, Executive Order 13132 (64 FR 43255,

August 10, 1999) does not apply to this action. Consistent with EPA and Corps policy to promote communications between the agencies and state and local governments, and in recognition of the vital role states play in implementation of the CWA, EPA voluntarily undertook federalism consultation for this effort and met the terms of E.O. 13132 and EPA guidance for implementing the Order. EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule to define "waters of the United States."

As part of this consultation, early in the rulemaking process, EPA held three in-person meetings and two phone calls in the fall and winter of 2011. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of States. In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation 12 counties, 8 associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments. In addition, EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings.

The agencies engaged in voluntary federalism consultation on this rule and we will continue to work closely with the states with respect to development of a final rule. Additionally, EPA and the Corps are specifically soliciting comments on this proposed action from state and local officials. The agencies will include a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000) Agencies may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the Agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. This action does not have tribal implications as specified in E.O. 13175.

In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), EPA consulted with tribal officials to gain an understanding of and, where appropriate, to address the tribal implications of the proposed rule. In the course of this consultation EPA coordinated with the Corps, and the Corps jointly participated in aspects of the consultation process. In the fall of 2011 EPA sent a Tribal Consultation Notification letter to all federally-recognized tribal leaders, via mail and email, inviting tribal officials to participate in outreach and consultation events and provide comments to EPA in coordination with the Corps. Close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from 3 tribes during the consultation period. In the spirit of E.O. 13175, and consistent with EPA and Corps policy to promote communications between the agencies and tribal governments, the agencies specifically solicit additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to E.O. 13045 because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs Federal agencies to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs Federal agencies to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the agencies are not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (E.O.) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The agencies have determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. The proposed rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of "waters of the United States" will be of benefit to all regulators, stakeholders, and interested parties. However, in the spirit of Executive Order 12898, we specifically request comment regarding potential environmental justice issues raised by the proposed rule, and will fully consider those comments when preparing the final rule.

K. Environmental Documentation

The U.S. Army Corps of Engineers has prepared a draft environmental assessment in accordance with the National Environmental Policy Act (NEPA). The Corps has made a preliminary determination that the section 404 aspects of today's proposed rule do not constitute a major Federal action significantly affecting the quality of the human environment, and thus preparation of an Environmental Impact Statement (EIS) will not be required. The proposed rule will increase and make more efficient the protection of the aquatic environment. Additionally, the Corps complies with NEPA programmatically for general permits, and specifically for each and every standard individual permit application before making final permit decisions.

The implementation of the procedures prescribed in this proposed regulation would not authorize anyone (e.g., any landowner or permit applicant) to perform any work involving regulated activities in "waters of the United States" without first seeking and obtaining an appropriate CWA authorization, which concurrently documents compliance with all applicable environmental laws.

Appendix A

Scientific Evidence

Overview of Scientific Literature on Aquatic Resource Connectivity and Downstream Effects

In preparation for this proposal, more than a thousand peer-reviewed scientific papers and other data that address connectivity of aquatic resources and effects on downstream waters were reviewed and considered. EPA's Office of Research and Development (ORD) has prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* (Washington, DC: U.S. Environmental Protection Agency, 2013), hereinafter, "Report"). This draft Report similarly has been considered in the development of this proposal. The Report is currently undergoing peer review led by EPA's Scientific Advisory Board (SAB) and is available at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument.* The Report also underwent an earlier peer review, and the results of this peer review are available in the docket for this proposed rule. The Report summarizes and assesses much of the currently available scientific literature that is part of the administrative record for this proposal. The agencies anticipate that additional data and information will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the rulemaking process is concluded. At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and will make any adjustments to the final rule deemed to be appropriate at that time. The Report is under review by the Science Advisory Board, and the rule will not be finalized until that review and the final report are complete. Part I of this Appendix provides the conclusions of the review and synthesis. Part II provides additional detail of the scientific literature and the agencies' reasoning in support of this proposal.

Part I: Synthesis of Peer-Reviewed Scientific Literature

Background

The draft Report prepared by ORD reviews and synthesizes the peer-reviewed scientific literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The purpose of the review and synthesis is to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which connected waters, singly or in aggregate, affect the function or condition of downstream waters. The focus of the Report is on surface and shallow subsurface connections from small or temporary streams, non-tidal wetlands, and certain open waters. Specific types of connections considered in the Report include transport of physical materials and chemicals such as water, wood, and sediment, nutrients, pesticides, and mercury; movement of organisms or their seeds or eggs; and hydrologic and biogeochemical interactions occurring in surface and groundwater flows, including hyporheic zones and alluvial aquifers.

The draft Report prepared by ORD consists of six chapters. Following an executive summary and an introduction to the Report, chapter 3 presents a conceptual framework describing the hydrologic elements of a watershed, the types of chemical, physical, and biological connections that link them, and watershed and climatic factors that influence connectivity at various temporal and spatial scales. It also provides background on the structure and function of streams and wetlands viewed from an integrated watershed perspective. In a discussion of connectivity, the watershed scale is the appropriate context for interpreting technical evidence about individual watershed components, reviewed in subsequent chapters. Chapter 4 surveys the literature on stream networks (lotic systems) in terms of chemical, physical, and biological connections between upstream and downstream habitats. Two case studies from the literature examine in greater detail longitudinal connectivity and downstream effects in prairie streams and arid streams of the Southwest. Chapter 5 reviews the literature on connectivity and effects of non-tidal wetlands and certain open waters (lentic systems) on downstream waters. This chapter is further subdivided into two broad categories of landscape settings based on directionality of hydrologic flows: *Bidirectional settings,* in which wetlands and open waters can have two-way hydrologic exchanges with other water bodies (e.g., riparian and floodplain wetlands and open waters), and *unidirectional settings,* in which water flows only from the wetland or open water towards the downstream water (e.g., most wetlands and open waters outside of riparian areas and floodplains). Directionality of hydrologic flow was selected as an organizational principle for this section because it has a dominant role in determining the types of connectivity and downstream effects (if any) of wetlands. However, the use of these landscape settings for hydrologic directionality should not be construed as suggesting directionality of geochemical or biological flows. Also, the terms "unidirectional" and "bidirectional" describe the landscape setting in which wetlands and open waters occur, and do not refer to wetland type or class. Four case studies from the literature examine evidence pertaining to connectivity and downstream effects of oxbow lakes, Carolina and Delmarva bays, prairie potholes, and vernal pools in greater detail.

Chapter 6 presents and discusses key findings and major conclusions of the review, which also are included at the end of each review section and in this executive summary.

Summary of Major Conclusions

Based on the review and synthesis of more than a thousand publications from the peer-reviewed scientific literature, the available evidence supports three major conclusions:

1. The scientific literature demonstrates that streams, individually and cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (headwaters) are the most abundant stream type in most river networks, and supply most of the water in rivers. In addition to water, streams supply sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. Streams are biologically connected to downstream waters by the dispersal and migration of aquatic and semi aquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both up- and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between streams and downstream waters interact via processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that would otherwise increase nutrient loading downstream.

2. Wetlands and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open waters in riparian areas and floodplains) are chemically, physically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus. They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

3. Wetlands and open waters in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity. These functions include storage of floodwater; retention and transformation of nutrients, metals, and pesticides; and recharge of groundwater sources of river baseflow. The functions and effects of this diverse group of wetlands, which the Report refers to as "unidirectional wetlands," affect the condition of downstream waters if there is a surface or shallow subsurface water connection to the river network. In unidirectional wetlands that are not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically within a watershed and over time. Because such wetlands occur on a gradient of connectivity, it is difficult to generalize about their effects on downstream waters. Generalization for this class is further complicated because, for certain functions (e.g., sediment removal and water storage), downstream effects are due to wetland isolation, rather than connectivity. The literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings. However, evaluations of individual geographically isolated wetlands or groups of geographically isolated wetlands could be possible through case-by-case analysis. Further, while the review did not specifically address other unidirectional water bodies, the conclusions apply to these water bodies (e.g., ponds and lakes that lack surface water inlets) as well, since the same principles govern hydrologic connectivity between these water bodies and downstream waters.

Section 3 below provides an overview of the conceptual framework, with further discussion of the key findings for streams, riparian and floodplain areas, and unidirectional wetlands.

1. Conceptual Framework Overview

Connectivity is a foundational concept in hydrology and freshwater ecology. The structure and function of downstream waters are highly dependent on the constituent materials contributed by and transported through water bodies located elsewhere in the watershed. Most of the materials in a river, including water, sediment, wood, organic matter, nutrients, chemical contaminants, and certain organisms, originate outside of the river, from upstream tributaries, wetlands, or other components of the river system, and are transported to the river by water movement, wind, or other means. Therefore, streams and wetlands fundamentally affect river structure and function by altering transport of various types of materials to the river. This alteration of material transport depends on two key factors: (1) Connectivity (or isolation) between streams, wetlands and rivers that enables (or prevents) the movement of materials between the system components; and (2) functions within streams and wetlands that supply, remove, transform, provide refuge for, or delay transport of materials.

The ORD Report defines connectivity as the degree to which components of a system are joined, or connected, by various transport mechanisms. Connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system. Isolation is the opposite of connectivity; or the degree to which system components are not joined. Both connectivity and isolation have important effects on downstream waters. For example, stream channels convey water and channel-forming sediment to rivers, whereas wetlands that lack output channels can reduce flooding and store excess sediment. Materials transport connects different ecosystem types, at multiple spatial and temporal scales. For example, streams flowing into and out of wetlands or between lakes form continuous or seasonal connections across ecosystem boundaries. Similarly, aquatic food webs connect terrestrial ecosystems, streams, wetlands, and downstream waters.

Water movement through the river system is the primary, but certainly not the only, mechanism providing physical connectivity within river networks. It provides a "hydraulic highway" that transports chemical, physical, and biological materials associated with the water (e.g., sediment, woody debris, contaminants, and organisms). Because the movement of water is fundamental to understanding watershed connectivity, Chapter 3 begins with a review and an explanation of the hydrologic foundation of river systems, and terms and concepts used throughout the Report are defined.

Numerous factors influence watershed connectivity. Climate, watershed topography, soil and aquifer permeability, the number and types of contributing waters, their spatial distribution in the watershed, interactions among aquatic organisms, and human alteration of watershed features, among other things, can act individually or in concert to influence stream and wetland connectivity to, and effects on, downstream waters. For example, all else being equal, materials traveling shorter distances could enter the river with less transformation or dilution, thus increasing a beneficial or harmful effect. In other cases, sequential transformations such as nutrient spiraling (defined and discussed below) connect distant water bodies and produce beneficial effects on downstream waters. Infrequent events that temporarily connect nearby or distant streams or wetlands to rivers also can have large, long-lasting effects. Most of the major changes in sediment load and river channel structure that are critical to maintaining river health—including meanders of rivers in floodplains and creation of oxbow lakes—are a result of large floods that provide infrequent, intense connections with more distant streams and riparian or floodplain waters.

Based on a review of the peer-reviewed scientific literature, the Report identifies five functions by which streams, wetlands, and open waters influence material transport into downstream waters:

- Source: The net export of materials, such as water and food resources
- Sink: The net removal or storage of materials, such as sediment and contaminants
- Refuge: The protection of materials, especially organisms
- Transformation: The transformation of materials, especially nutrients and chemical contaminants, into different physical or chemical forms
- Lags: The delayed or regulated release of materials, such as storm water

These functions are not static or mutually exclusive (e.g., a wetland can be both a source of organic matter and a sink for nitrogen) and can change over time (e.g., one wetland can be a water sink when evapotranspiration is high and a water source when evapotranspiration is low). Further, some functions work in conjunction with others. For example, a lag function can include transformation of materials prior to their delayed release. In a particular stream, wetland, or open water, the presence or absence of these functions depends upon the biota, hydrology, and environmental conditions in the watershed.

When considering effects on downstream waters, it is helpful to distinguish between *actual function* and *potential function* of a stream, wetland, or open water. For example, a wetland with appropriate conditions for denitrification is a *potential* sink for nitrogen, a nutrient that can be a contaminant when present in high concentrations. This function is conditional; if nitrogen were to enter a wetland (from agricultural runoff, for example), the wetland has the capacity to remove this nitrogen from the water. The wetland will not serve this function, however, if no nitrogen enters the wetland. Even if a stream or wetland is not currently serving an *actual* function, it has the *potential* to provide that function when a new material enters it, or when environmental conditions change. Thus, potential functions play a critical role in protecting those waters from future impacts.

2. Discussion of Major Conclusions

A. Streams

The scientific literature demonstrates that streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (headwaters) are the most abundant stream type in most river networks, and supply most of the water in rivers. In addition to water, streams supply sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. Streams are biologically connected to downstream waters by dispersal and migration of aquatic and semi-aquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both up- and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between streams and downstream waters interact via processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that would otherwise increase nutrient loading downstream.

Key findings:

a. Streams are hydrologically connected to downstream waters via channels that convey surface and subsurface water year-round (perennial flow), weekly to seasonally (intermittent flow), or only in direct response to precipitation (ephemeral flow). Streams are the dominant source of water in most rivers, and the great majority of tributaries are perennial, intermittent, and ephemeral headwater streams. For example, headwater streams, which are the smallest channels where stream flows begin, are the source of approximately 60% of the total mean annual flow to all northeastern U.S. streams and rivers.

b. Headwaters convey water into local storage compartments such as ponds, shallow aquifers, or river banks and into regional and alluvial aquifers. These local storage compartments are important sources of water for baseflow in rivers. The ability of streams to keep flowing even during dry periods typically depends on the delayed (lagged) release of local groundwater, also referred to as shallow groundwater, originating from these water sources, especially in areas with shallow groundwater tables and pervious subsurfaces. For example, in the southwestern United States, short-term shallow groundwater storage in alluvial floodplain aquifers, with gradual release into stream channels by intermittent and ephemeral streams, is a major source of annual flow in rivers.

c. Even infrequent flows through ephemeral or intermittent channels influence fundamental biogeochemical processes by connecting the channel and shallow groundwater with other landscape elements. Infrequent, high-magnitude events are especially important for transmitting materials from headwater streams in most river networks. For example, headwater streams, including ephemeral and intermittent streams, shape river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris. These materials provide substrate, habitat for aquatic organisms, and slow the flow of water through channels.

d. Connectivity between streams and rivers provides opportunities for materials, including nutrients and chemical contaminants, to be sequentially altered as they are transported downstream. Although highly efficient at transport of water and other physical materials, streams are not pipes. They are dynamic ecosystems with permeable beds and banks that interact with terrestrial and aquatic ecosystems above and below the surface. The connections formed by surface and subsurface streamflows act as a series of complex chemical, physical, and biological alterations that occur as materials move through different parts of the river system. The amount and quality of such materials that eventually reach a river are determined by the aggregate effect of these sequential alterations that begin at the source waters, which can be at some distance from the river. The greater the distance a material travels between a particular stream reach and the river, the greater the opportunity for that material to be altered in intervening stream reaches, which can allow for uptake, assimilation, or beneficial transformation. One example of sequential alteration with significant beneficial effects on downstream waters is the process of nutrient spiraling, in which nutrients entering headwater streams are transformed by various aquatic organisms and chemical reactions as they are transported downstream by streamflow. Nutrients which enter the headwater stream (e.g., via overland flow) are first removed from the water column by streambed algal and microbial populations. Fish or insects feeding on algae and microbes take up some of those nutrients, which are subsequently released back to the stream via excretion and decomposition, and the cycle is repeated. In each phase of the cycling process—from dissolved inorganic nutrients in the water column, through microbial uptake, subsequent transformations through the food web, and back to dissolved nutrients in the water column—nutrients are subject to downstream transport. Stream and wetland capacities for nutrient cycling have important implications for the form and concentration of nutrients exported to downstream waters.

e. The literature review found strong evidence that headwater streams function as nitrogen sources (export) and sinks (uptake and transformation) for river networks. One study estimated that rapid nutrient cycling in small streams that were free from agricultural or urban impacts removed 20–40% of the nitrogen that otherwise would be delivered to downstream waters. Nutrients are necessary to support aquatic life, but excess nutrients create conditions leading to eutrophication and hypoxia, in which oxygen concentrations fall below the level necessary to sustain most within and near-bed animal life. Thus, the role of streams in influencing nutrient loads can have significant repercussions for hypoxic areas in downstream waters.

f. Headwaters provide critical habitat during one or more life cycle stages of many organisms capable of moving throughout river networks. This review found strong evidence that headwaters provide habitat for complex life-cycle completion, refuge from predators or adverse physical conditions in rivers, and reservoirs of genetic- and species-level diversity. Use of headwater streams as habitat is especially obvious for the many species that migrate between small streams and marine environments during their life cycles (e.g., Pacific and Atlantic salmon, American eels, certain lamprey species), and the presence of these species within river networks provides robust evidence of biological connections between headwaters and larger rivers. In prairie streams, many fishes swim upstream into tributaries to release eggs, which develop as they are transported downstream. Small streams also provide refuge habitat for riverine organisms seeking protection from temperature extremes, flow extremes, low dissolved oxygen, high sediment levels, or the presence of predators, parasites, and competitors.

B. Riparian/Floodplain Waters

Wetlands and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open waters in riparian areas and floodplains) are chemically, physically, or biologically connected with rivers via the export of channel forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus. They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

Key Findings:

a. Riparian areas act as buffers that are among the most effective tools for mitigating nonpoint source pollution. The wetland literature shows that collectively, riparian wetlands improve water quality through assimilation, transformation, or sequestration of nutrients, sediment and other pollutants—such as pesticides and metals—that can affect downstream water quality. These pollutants enter wetlands via various pathways that include various sources such as dry and wet atmospheric deposition, some runoff from upland agricultural and urban areas, spray drift, and subsurface water flows, as well as point sources such as outfalls, pipes, and ditches.

b. Riparian and floodplain areas connect upland and aquatic environments through both surface and subsurface hydrologic flow paths. These areas are therefore uniquely situated in watersheds to receive and process

waters that pass over densely vegetated areas and through subsurface zones before reaching streams and rivers. When contaminants reach a riparian or floodplain area, such materials can be sequestered in sediments, assimilated into the wetland plants and animals, transformed into less harmful forms or compounds, or lost to the atmosphere. Wetland potential for biogeochemical transformations (e.g., denitrification) that can improve the quality of water entering streams and rivers is influenced by factors present in riparian areas and floodplains, including anoxic conditions, shallow water tables, slow organic matter decomposition, wetland plant communities, permeable soils, and complex topography.

c. Riparian and floodplain areas can reduce flood peaks by storing and desynchronizing floodwaters. They also can contribute to maintenance of flow by recharging alluvial aquifers. Many studies have documented the ability of riparian and floodplain areas to reduce flood pulses by storing excess water from streams and rivers. One review of wetland studies reported that riparian wetlands reduced or delayed floods in 23 of 28 studies. For example, peak discharges between upstream and downstream gauging stations on the Cache River in Arkansas were reduced 10–20% primarily due to floodplain water storage.

d. Riparian and floodplain areas store large amounts of sediment and organic matter from upland areas before those sediments enter the stream. For example, riparian areas have been shown to filter 80–90% of sediments leaving agricultural fields in North Carolina (A. Cooper, *et al.*, "Riparian Areas as Filters for Agricultural Sediment," *Soil Science Society of America Proceedings* 51:416–420 (1987); R.B. Daniels, and J.C. Gilliam, "Sediment and Chemical Load Reduction by Grass and Riparian Filters," *Soil Science Society of America Journal* 60:246–251 (1996); R.J. Naiman, and H. Decamps, "The Ecology of Interfaces: Riparian Zones," *Annual Review of Ecology and Systematics* 28:621–658 (1997)).

e. Ecosystem function within a river system is driven by interactions between the physical environment and the diverse biological communities living within the river system. Movements of organisms connect aquatic habitats and populations in different locations through several processes important for the survival of individuals, populations, and species, and for the functioning of the river ecosystem. For example, lateral expansion and contraction of the river in its floodplain results in an exchange of matter and organisms, including fish populations that are adapted to use floodplain habitat for feeding and spawning during high water. Refuge populations of aquatic plants in floodplains can become important seed sources for the river network, especially if catastrophic flooding scours vegetation and seed banks in other parts of the channel. Many invertebrates exploit temporary hydrologic connections between rivers and floodplain wetland habitats, moving into these wetlands to feed, reproduce, or avoid harsh environmental conditions and then returning to the river network. Amphibians and aquatic reptiles in many parts of the country commonly use both streams and wetlands, including wetlands in riparian and floodplain areas, to hunt, forage, overwinter, rest, or hide from predators.

C. Unidirectional Wetlands

Wetlands and open waters in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity. These functions include storage of floodwater; retention and transformation of nutrients, metals, and pesticides; and recharge of groundwater sources of river baseflow. The functions and effects of this diverse group of wetlands, hereafter referred to as "unidirectional wetlands," clearly affect the condition of downstream waters if there is a surface or shallow subsurface water connection to the river network. In unidirectional wetlands that are not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically within a watershed and over time. Because such wetlands occur on a gradient of connectivity, it is difficult to generalize about their effects on downstream waters. This evaluation is further complicated because, for certain functions (e.g., sediment removal and water storage), downstream effects arise from wetland isolation, rather than connectivity. The literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings. However, evaluations of connectivity of individual wetlands or groups of wetlands could be possible through case-by-case analysis. Further, while the review did not specifically address other unidirectional water bodies, the conclusions apply to these water bodies (e.g., ponds and lakes that lack surface water inlets) as well, since the same principals govern hydrologic connectivity between these water bodies and downstream waters.

Key Findings:

a. Water storage by wetlands well outside of riparian or floodplain areas can affect streamflow. Hydrologic models of prairie potholes in the Starkweather Coulee subbasin (North Dakota) that drain to Devils Lake indicate that increasing the volume of pothole storage across the sub-basin by approximately 60% caused simulated total annual streamflow to decrease 50% during a series of dry years and 20% during wet years. Similar simulation studies of watersheds that feed the Red River of the North in North Dakota and Minnesota demonstrated qualitatively comparable results, suggesting that the ability of potholes to modulate streamflow may be widespread across portions of the prairie pothole region. This work also indicates that reducing wetland water storage capacity by connecting formerly isolated potholes through ditching or drainage to the Devils Lake and Red River basins could increase stormflow and contribute to downstream flooding. In many agricultural areas already crisscrossed by extensive drainage systems, total streamflow and baseflow are enhanced by directly connecting potholes to stream networks. The impacts of changing streamflow are numerous, including altered flow regime, stream geomorphology, habitat, and ecology. The presence or absence of an effect of prairie pothole water storage on streamflow depends on many factors, including patterns of precipitation, topography and degree of human alteration. For example, in parts of the prairie pothole region with low precipitation, low stream density, and little human alteration, hydrologic connectivity between prairie potholes and streams or rivers is likely to be low.

b. Unidirectional wetlands act as sinks and transformers for various pollutants, especially nutrients, which pose a serious pollution problem in the United States. In one study, sewage wastewaters were applied to forested unidirectional wetlands in Florida for a period of 4.5 years. More than 95% of the phosphorus, nitrate, ammonium, and total nitrogen were removed by the wetland during the study period, and 66–86% of the nitrate removed was attributed to the process of denitrification. In another study, sizeable phosphorus retention occurred in unidirectional marshes that comprised only 7% of the lower Lake Okeechobee basin area in Florida. A unidirectional bog in Massachusetts was reported to sequester nearly 80% of nitrogen inputs from various sources, including atmospheric deposition, and prairie pothole wetlands in the upper Midwest were found to remove ~80% of the nitrate load via denitrification. A large unidirectional prairie marsh was found to remove 86% of nitrate, 78% of ammonium, and 20% of phosphate through assimilation and sedimentation, sorption, and other mechanisms. Together, these and other studies indicate that on-site removal of nutrients by unidirectional wetlands is significant and geographically widespread. The effects of this removal on rivers are generally not reported in the literature.

c. Biological connectivity can occur between unidirectional wetlands and downstream waters through movement of amphibians, aquatic seeds, macroinvertebrates, reptiles, and mammals. Many species in those groups that use both stream and wetland habitats are capable of dispersal distances equal to or greater than distances between many unidirectional wetlands and river networks. Unidirectional wetlands can be hydrologically connected directly to river networks through channels, non-channelized surface flow, or subsurface flows. A wetland surrounded by uplands is defined as "geographically isolated." Our review found that in some cases, wetland types such as vernal pools and coastal depressional wetlands are collectively, and incorrectly, referred to as geographically isolated. Technically, the term "geographically isolated" should be applied only to the particular wetlands within a type or class that are completely surrounded by uplands. Furthermore, "geographic isolation" should not be confused with functional isolation, because geographically isolated wetlands can still have hydrological and biological connections to downstream waters.

d. Unidirectional wetlands occur along a gradient of hydrologic connectivity-isolation with respect to river networks, lakes, or marine/estuarine water bodies. This gradient includes, for example, wetlands that serve as origins for stream channels that have permanent surface water connections to the river network; wetlands with outlets to stream channels that discharge to deep groundwater aquifers; geographically isolated wetlands that have local groundwater or occasional surface water connections to downstream waters; and geographically isolated wetlands that have minimal hydrologic connection to other water bodies (but which could include surface and subsurface connections to other wetlands). The existence of this gradient among wetlands of the same type or in the same geographic region can make it difficult to determine or generalize, from the literature alone, the degree to which particular wetlands (individually or as classes), including geographically isolated wetlands, are hydrologically connected.

e. A related issue is that spatial scale must be considered when determining geographic isolation. Individual wetlands that are geographically isolated could be connected to downstream waters when considered as a complex (a group of interacting wetlands). This principle was demonstrated in a recent study that examined a depressional wetland complex on the Texas coastal plain. These wetlands have been considered as a type of geographically isolated wetlands. Collectively, however, they are geographically and hydrologically connected to downstream waters in the area. During an almost 4-year study period, nearly 20% of the precipitation that fell on the wetland complex flowed as surface runoff through an intermittent stream to a nearby waterway, the Armand Bayou. Thus, wetland complexes could have connections to downstream waters through stream channels even when the individual wetland components are geographically isolated.

3. Closing Comments

The strong hydrologic connectivity of river networks is apparent in the existence of stream channels that form the physical structure of the network itself. Given the discussion above, it is clear that streams and rivers are much more than a system of physical channels for conveying water and other materials downstream, but the presence of physical channels is one strong line of evidence for surface water connections from tributaries, or water bodies of other types, to downstream waters. Physical channels are defined by continuous bed and bank structures, which may include apparent disruptions (such as by bedrock outcrops, braided channels, flow-through wetlands) associated with changes in the material and gradient over and through which water flows. The continuation of bed and banks down gradient from such disruptions is evidence of the surface connection with the channel that is up gradient of the perceived disruption.

The structure and function of rivers are highly dependent on the constituent materials that are stored in and transported through them. Most of these materials, broadly defined here as any chemical, physical, or biological entity, including, but not limited to, water, heat energy, sediment, wood, organic matter, nutrients, chemical contaminants, and organisms, originate outside of the river: They originate from either the upstream river network or other components of the river system, and then are transported to the river by water movement or other mechanisms. Thus, the fundamental way in which streams and wetlands affect river structure and function is by altering fluxes of materials to the river. The control of material fluxes depends on two key factors: (1) Functions within streams and wetlands that affect material fluxes, and (2) connectivity (or isolation) between streams and wetlands and rivers that allows (or prevents) transport of materials between the systems.

Absence of channels does not, however, mean that a wetland or open water is isolated or only infrequently connected to downstream waters. Areas that are infrequently flooded by surface water can be connected more regularly through shallow groundwater or through dispersal among biological populations and communities. Such wetlands and open waters also can reduce flood peaks by storing flood waters, filter large amounts of sediment and nutrients from upland areas, influence stream geomorphology by providing woody debris and sediment, and regulate stream temperature. They also serve as sources of food for river biota and sources of genetic diversity for populations of stream invertebrates.

Unidirectional wetlands can reduce and attenuate floods through water storage, and can recharge groundwater, thereby contributing to stream and river baseflow. These wetlands also affect nutrient delivery and improve water quality by functioning as sources of food and as sinks for metals, pesticides, excess nutrients. Biological connectivity can also occur between unidirectional wetlands and downstream waters, through movement of amphibians, aquatic insects, aquatic reptiles, migratory birds, and riverine mammals that require or opportunistically use both river and wetland or open water habitats. However, given a geographically isolated wetland for which a surface water connection cannot be observed, it is difficult to assess its degree of connectivity with the river network without site-specific data.

Additionally, caution should be used in interpreting connectivity for wetlands based on their being designated as "geographically isolated" since (a) the term can be mistakenly applied to a heterogeneous group of wetlands that can include wetlands that are not geographically isolated, (b) wetlands with permanent channels could be miscategorized as geographically isolated if the designation is based on maps or imagery with inadequate spatial resolution, obscured views, etc., and (c) wetland complexes could have connections to downstream waters through stream channels even if individual wetlands within the complex are geographically isolated. Thus, the term "geographically isolated" should only be applied to groups of wetlands if they fit the technical definition (i.e., they are surrounded by uplands). Further, even geographically isolated wetlands can be connected to other wetlands and downstream waters through groundwater connections, occasional spillage, or biological connections. Thus, the term "geographically isolated" should not be used to infer lack of hydrologic, chemical, or biological connectivity.

Lastly, to understand the health, behavior, and sustainability of downstream waters, effects of small water bodies in a watershed need to be considered in aggregate. The contribution of material by a particular stream and wetland might be small, but the aggregate contribution by an entire class of streams and wetlands (e.g., all ephemeral streams in the river network) might be substantial. For example, western vernal pools typically occur within "vernal pool landscapes" or complexes of pools in which swales connect pools to each other and to seasonal streams, and in which the hydrology and ecology are tightly coupled with the local and regional geological processes that formed them. The vernal pool basins, swales, and seasonal streams are part of a single surface water and shallow groundwater system connected to the river network when seasonal precipitation exceeds storage capacity of the wetlands. Since rivers develop and respond over time and are functions of the whole watershed, understanding the integration of contributions and effects over time is also necessary to have an accurate understanding of the system, taking into account the duration and frequency of material export and delivery to downstream waters. In addition, when considering the effect of an individual stream or wetland, it is important to include the cumulative effect of all materials that originate from it, rather than each material individually, to understand that water body's influence on downstream waters.

Part II: Additional Scientific Support

i. Tributaries

The agencies propose that all waters that meet the proposed definition of tributary are "waters of the United States" because they meet Justice Kennedy's test for jurisdiction under *Rapanos*. In other words, the agencies are asserting that all tributaries have a significant nexus with traditional navigable waters, interstate waters, and/or the territorial seas. EPA and the Corps' longstanding definition of "waters of the United States" has included tributaries. That regulation was based on the agencies' historic view of the scope of the CWA and the general scientific understanding about the ecological and hydrological relationship between waters.

Tributaries have a substantial impact on the chemical, physical, or biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas. The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, pollutants, nutrients, and organisms to downstream environments. Tributaries serve to store

water (thereby reducing flooding), provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries. These conclusions are strongly supported in the scientific literature, as discussed below.

Headwater streams are the smallest channels where stream flows begin, and often occur at the outer rims of a watershed. Typically these are first-order streams (i.e., they do not have any other streams flowing into them). However, headwater streams can include streams with multiple tributaries flowing into them and can be perennial, intermittent or ephemeral, but are still located near the channel origins of the tributary system in a watershed.

Protection of tributaries under the CWA is critically important because they serve many important functions which directly influence the integrity of downstream waters. It is necessary to regulate the entire tributary system to fulfill the objective of the CWA, because discharges of pollutants into the tributary system adversely affect the chemical, physical, or biological integrity of these waters. For example, destruction or modification of headwater streams has been shown to affect the integrity of downstream waters, in part through changes in hydrology, chemistry and stream biota. M.C. Freeman, *et al.*, "Hydrologic Connectivity and the Contribution of Stream Headwaters to Ecological Integrity at Regional Scales," *Journal of the American Water Resources Association* 43:5–14. (2007); M.S. Wipfli., *et al.*, "Ecological Linkages between Headwaters and Downstream Ecosystems: Transport of Organic Matter, Invertebrates, and Wood Down Headwater Channels," *Journal of the American Water Resources Association* 43:72–85 (2007). Additionally, activities such as discharging a pollutant into one part of the tributary system are well-documented to affect, at times, other parts of the system, even when the point of discharge is far upstream from the navigable water that experiences the effect of the discharge. In order to protect traditional navigable waters, interstate waters, and the territorial seas it is also critically important to protect tributaries as defined in today's proposal that are upstream from those waters.

A. The Agencies Have Concluded That Tributaries, as Defined in the Proposed Rule, Have a Significant Nexus

The scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks because they are directly connected to rivers via permanent surface features (channels and associated alluvial deposits) that concentrate, mix, transform, and transport water and other materials, including food resources, downstream. Tributaries transport, and often transform, chemical elements and compounds, such as nutrients, ions, dissolved and particulate organic matter and contaminants, influencing water quality, sediment deposition, nutrient availability, and biotic functions in rivers. Streams also are biologically connected to downstream waters by dispersal and migration, processes which have critical implications for aquatic populations of organisms that use both headwater and river or open water habitats to complete their life cycles or maintain viable populations. The scientific literature clearly demonstrates that cumulatively, streams exert strong influence on the character and functioning of rivers. In light of these well documented connections and functions, the agencies concluded that tributaries, as defined, alone or in combination with other tributaries in a watershed, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. The scientific literature supports this conclusion for ephemeral tributaries, as well as for intermittent and perennial tributaries; for tributaries both near to and far from the downstream traditional navigable water, interstate water, or the territorial seas; and for natural tributaries or man-altered tributaries, which may include certain ditches and canals.

The discussion below summarizes the key points in the literature regarding the chemical, physical, and biological connections and functions of tributaries that significantly affect downstream waters. In addition, the evidence regarding headwater streams and non-perennial streams, types of tributaries whose important functional relationships to downstream traditional navigable waters and interstate waters might not be obvious, is summarized. The scientific literature does not use legal terms like "traditional navigable water," "interstate water," or "the territorial seas." Rather, the literature assesses tributaries in terms of their connections to and effects on downstream waters in a watershed. While the agencies define as "waters of the United States" tributaries only in watersheds which drain to a traditional navigable water, interstate water, or the territorial seas, that distinction does not affect the conclusions of the scientific literature with respect to the effects of tributaries on downstream waters.

B. Tributaries Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters

Tributaries, even when seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments. *See, e.g.,* Report at 4–3 (citing T.C. Winter, 2007, "The role of groundwater in generating streamflow in headwater areas and in maintaining base flow," *Journal of the American Water Resources Association* 43:15–25; P.A. Bukaveckas, "Rivers," in G.E. Likens, ed., *Encyclopedia of Inland Waters,* Vol. 1 (Elsevier: Oxford, 2009)). Distant headwaters with stronger connections to groundwater or consistently higher precipitation levels than downstream reaches contribute more water to downstream rivers. In the northeastern United States headwater streams contribute greater than 60% of the water volume in larger tributaries, including navigable rivers. *See, e.g., id.* (citing R.B. Alexander, *et. al.,* "The role of headwater streams in downstream water quality," *Journal of the American Water Resources Association* 43:41–59 (2007)). The contributions of tributaries to river flows are often readily measured or observed, especially immediately below confluences, where tributary flows increase the flow volume and alter physical conditions, such as water temperature, in the main stream. The physical effects of tributaries are particularly clear after intense rainfall occurs over only the upper tributary reaches of a river network. For example, a study of ephemeral tributaries to the Rio Grande in New Mexico found that after a storm event contributions of the stormflow from ephemeral tributaries accounted for 76% of the flow of the Rio Grande. *See, e.g., id.* at 4–5 (citing E.R. Vivoni, *et. al.,* "Analysis of a Monsoon Flood Event in an Ephemeral Tributary and Its Downstream Hydrologic Effects," *Water Resources Research* 42:W03404 (2006)). A key effect of tributaries on the hydrologic response of river networks to storm events is dispersion, or the spreading of water output from a drainage basin over time. Hydrologic dispersion of connected tributaries influence the timing and volume of water reaching a river network outlet. *See, e.g., id.* at 4–5 to 4–6 (citing P. M. Saco and P. Kumar, "Kinematic dispersion in stream networks coupling hydraulics and network geometry," *Water Resources Research* 38:1244 (2002)). Tributaries also can reduce the amount of water that reaches downstream rivers and minimize downstream flooding, often through infiltration or seepage through channel beds and banks or through evapotranspiration. *See, e.g., id.* at 4–8 (citing S.K. Hamilton, *et al.,* "Persistence of Aquatic Refugia between Flow Pulses in a Dryland River System (Cooper Creek, Australia)," *Limnology and Oceanography* 50:743–754 (2005); J.F. Costelloe, *et.al.,* "Determining Loss Characteristics of Arid Zone River Waterbodies," *River Research and Applications* 23:715–731 (2007)).

One of the primary functions of tributaries is transporting sediment to downstream waters. Tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. Sediment transport is also clearly provided by ephemeral streams. Effects of the releases of sediment and large woody debris are especially evident at tributary-river confluences, where discontinuities in flow regime and temperature clearly demonstrate physical alteration of river structure and function by headwater streams. Report at 4–10, 4–14. Sediment movement is critical for maintaining the river network, including rivers that are considered to be traditional navigable waters, as fluvial (produced by the action of a river or stream) sediments are eroded from some channel segments, and deposited in others downstream to form channel features, stream and riparian habitat which supports the biological communities resident downstream, and influence the river hydrodynamics. *See, e.g.,* J.L. Florsheim, *et al.,* "Bank Erosion as a Desirable Attribute of Rivers," *Bioscience* 58:519–29 (2008); Report at 4–9 (citing M. Church, "Bed material transport and the morphology of alluvial river channels," *Annual Review of Earth and*

Planetary Sciences: 325–354 (2006)). While essential to river systems, too much sediment can impair ecological integrity by filling interstitial spaces, blocking sunlight transmission through the water column, and increasing contaminant and nutrient concentrations. Report at 4–9 (citing P.J. Wood and P.D. Armitage, "Biological Effects of Fine Sediment in the Lotic Environment," *Environmental Management* 21:203–217 (1997)). Over sedimentation thus can reduce photosynthesis and primary productivity within the stream network and otherwise have harmful effects on downstream biota, including on the health and abundance of fish, aquatic macrophytes (plants), and aquatic macroinvertebrates that inhabit downstream waters. *See, e.g.,* Wood and Armitage 1997. Headwater streams tend to trap and store sediments behind large structures, such as boulders and trees, that are transported downstream only during infrequent large storm events. *See* Report at 4–10, 4–12 (citing L.E. Benda, and T.W. Cundy, "Predicting deposition of debris flows in mountain channels," *Canadian Geotechnical Journal* 27:409–417 (1990); T. Gomi and R.C. Sidle, "Bed load transport in managed steep-gradient headwater streams of southeastern Alaska," *Water Resources Research* 39:1336 (2003); L.E. Benda, et al., "Geomorphology of steepland headwaters: The transition from hillslopes to channels," *Journal of the American Water Resources Association* 41:835–851 (2005); P.E. Bigelow, *et al.,* "On Debris Flows, River networks, and the Spatial Structure of Channel Morphology," *Forest Science* 53:220–238 (2007); J.P.R. Gooderham, *et al.,* "Upstream Heterogeneous Zones: Small Stream Systems Structured by a Lack of Competence?" *Journal of the North American Benthological Society* 26:365–374 (2007)).

Tributaries can greatly influence water temperatures in tributary networks. This is important because water temperature is a critical factor governing the distribution and growth of aquatic life, both directly (through its effects on organisms) and indirectly (through its effects on other physicochemical properties, such as dissolved oxygen and suspended solids). *Id.* at 4–13 (citing J.D Allan, *Stream Ecology—Structure and Function of Running Waters* (New York, NY Chapman & Hall, 1995)). For instance, water temperature controls metabolism and level of activity in cold blooded species like fish, amphibians, and aquatic invertebrates. *See, e.g.,* G.G. Ice, "Chapter 3: Stream Temperature and Dissolved Oxygen," *in* J.D. Stednick, ed., *Hydrologic and Biological Responses to Forest Practices* (Springer, 2008). Temperature can also control the amount of dissolved oxygen in streams, as colder water holds more dissolved oxygen, which fish and other fauna need to breathe. Connections between tributaries and downstream rivers can affect water temperature in river networks. *See, e.g.,* Report at 4–13 (citing S. Knispel, and E. Castella, "Disruption of a Longitudinal Pattern in Environmental Factors and Benthic Fauna by a Glacial Tributary," *Freshwater Biology* 48:604–618 (2003); S.P. Rice, *et al.,* "The Ecological Importance of Tributaries and Confluences," *in* S.P. Rice, *et al.,* ed., *River Confluences, Tributaries and the Fluvial Network,* (Chichester, UK: John Wiley & Sons, 2008), pp. 209–242)). In particular, tributaries provide both cold and warm water refuge habitats that are critical for protecting aquatic life. *Id.* at 4–32. Because headwater tributaries often depend on groundwater inputs, temperatures in these systems tend to be warmer in the winter (when groundwater is warmer than ambient temperatures) and colder in the summer (when groundwater is colder than ambient temperatures) relative to downstream waters. *Id.* (citing G. Power, *et al.,* "Groundwater and Fish: Insights from Northern North America," *Hydrological Processes* 13:401–422 (1999)). Thus tributaries provide organisms with both warm water and coldwater refuges at different times of the year. *Id.* (citing R.A. Curry, *et al.,* "Use of Small Streams by Young Brook Trout Spawned in a Lake," *Transactions of the American Fisheries Society* 126:77–83 (1997); C.V. Baxter, and F.R. Hauer, "Geomorphology, Hyporheic Exchange and Selection of Spawning Habitat by Bull Trout (*Salvelinus confluentus*)," *Canadian Journal of Fisheries and Aquatic Sciences* 57: 1470–1481 (2000); T.R. Labbe, and K.D. Fausch, "Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales," *Ecological Applications* 10:1774–1791 (2000); M.J. Bradford, *et al.,* "Ecology of Juvenile Chinook Salmon in a Small Non-natal Stream of the Yukon River Drainage and the Role of Ice Conditions on Their Distribution and Survival," *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 79:2043–2054 (2001)). For example, when temperature conditions in downstream waters are adverse, fish can travel upstream and use tributaries as refuge habitat. *Id.* (citing Curry *et al.* 1997; M.A. Cairns, *et al.,* "Influence of Summer Stream Temperatures on Black Spot Infestation of Juvenile Coho Salmon in the Oregon Coast Range," *Transactions of the American Fisheries Society* 134:1471–1479 (2005)). Tributaries also help buffer temperatures in downstream waters. *Id.* at 4–13 to 4–14 (citing D. Caissie, "The thermal regime of rivers: A review," *Freshwater Biology* 51:1389–1406 (2006)) Temperatures in tributaries affect downstream water temperature many kilometers away. *Id.* at 4–14 (citing B Gardner, and P.J. Sullivan, "Spatial and Temporal Stream Temperature Prediction Modeling Nonstationary Temporal Covariance Structures," *Water Resources Research* 40:W01102 doi (2004); B.R Johnson, *et al.,* "Use of Spatially Explicit Physicochemical Data to Measure Downstream Impacts of Headwater Stream Disturbance," *Water Resources Research* 46:W09526 (2010)).

C. Tributaries Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters

Tributaries transform and export significant amounts of nutrients and carbon to downstream waters, serving important source functions that greatly influence the chemical integrity of downstream waters. Organic carbon, in both dissolved and particulate forms, exported from tributaries is consumed by downstream organisms. The organic carbon that is exported downstream thus supports biological activity (including metabolism) throughout the river network. *See, e.g.,* Report at 4–22 (citing S.G. Fisher and G.E. Likens, "Energy Flow in Bear Brook, New Hampshire: An Integrative Approach to Stream Ecosystem Metabolism," *Ecological Monographs* 43: 421–439 (1973); J.L. Meyer, "The Microbial Loop in Flowing Waters," *Microbial Ecology* 28:195–199 (1994); J.B. Wallace, *et al.* "Multiple Trophic Levels of a Forest Stream Linked to Terrestrial Litter Inputs," *Science* 277:102–104 (1997); R.O. Hall and J.L. Meyer, "The Trophic Significance of Bacteria in a Detritus-Based Stream Food Web," *Ecology* 79:1995–2012 (1998); R.O. Hall, *et al.,* "Organic Matter Flow in Stream Food Webs with Reduced Detrital Resource Base," *Ecology* 81:3445–3463 (2000); C. Augspurger, *et al.,* "Tracking Carbon Flow in a 2-Week-Old and 6-Week-Old Stream Biofilm Food Web," *Limnology and Oceanography* 53:642–650 (2008)). Much or most of the organic carbon that is exported from tributaries has been altered either physically or chemically by ecosystem processes within the tributary streams, particularly by headwater streams.

Nutrient export from tributaries has a large effect on downstream water quality, as excess nutrients from surface runoff from lawns and agricultural fields can cause algal blooms that reduce dissolved oxygen levels and increase turbidity in rivers, lakes, estuaries, and territorial seas. Water low in dissolved oxygen cannot support aquatic life; it is widely-recognized that this phenomenon has resulted in the devastation of commercial and recreational fisheries in the northern Gulf of Mexico. Committee on Environment and Natural Resources, *Integrated Assessment of Hypoxia in the Northern Gulf of Mexico* (Washington, DC: National Science and Technology Council, 2000). The amount of nitrogen that is exported downstream varies depending on stream size, and how much nitrogen is present in the system. Nitrogen loss is greater in smaller, shallow streams, most likely because denitrification and settling of nitrogen particles occur at slower rates in deeper channels. Report at 4–16 (citing R.C. Alexander, *et al.,* "Effect of Stream Channel Size on the Delivery of Nitrogen to the Gulf of Mexico," *Nature* 403:758–761 (2000)). At low loading rates, the biotic removal of dissolved nitrogen from water is high and occurs primarily in small tributaries, reducing the loading to larger tributaries and rivers downstream. At high nitrogen loading rates, tributaries become nitrogen saturated and are not effectively able to remove nitrogen, resulting in high nitrogen export to rivers. *Id.* at 4–18 (citing P.J. Mulholland, *et al.,* "Stream Denitrification across Biomes and Its Response to Anthropogenic Nitrate Loading," *Nature* 452:202–205 (2008)). The transport of nitrogen and phosphorus downstream has also been well-documented, particularly in the cases of the Gulf of Mexico and the Chesapeake Bay. Tributary streams in the uppermost portions of the Gulf and Bay watersheds transport the majority of nutrients to the downstream waters; an estimated 85% of nitrogen arriving at the hypoxic zone in the Gulf originates in the

upper Mississippi (north of Cairo, Illinois) and the Ohio River Basins. D. Goolsby, et al., *Topic Report 3, Flux and Sources of Nutrients in the Mississippi-Atchafalaya River Basin* (Washington, DC: National Science and Technology Council Committee on Environment and Natural Resources, 1999). The export of nutrients from streams in the Mississippi River Basin has an effect on anoxia, or low oxygen levels, in the Gulf. Report at 4–17 (citing N.N. Rabalais, *et al.*, "Gulf of Mexico Hypoxia, a.k.a. 'the Dead Zone,'" *Annual Review of Ecology and Systematics* 33:235–263 (2002)). Similarly, nutrient loads from virtually the entire 64,000 square mile watershed affect water quality in the Chesapeake Bay. Simulation tools have been used to determine the nutrient and sediment load reductions that must be made at many different points throughout the entire watershed in order to achieve acceptable water quality in the mainstem of the Bay. These reductions included specific annual nitrogen caps on the upper reaches of the Susquehanna River in New York State, more than 400 miles from the mouth of the Chesapeake Bay. *See e.g.*, U.S. Environmental Protection Agency (EPA), Region III, Chesapeake Bay Program Office, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The Collaborative Process, Technical Tools and Innovative Approaches*, EPA 903–R–03–007 (Washington, DC: EPA, 2003); Rabalais *et al.* 2002.

Although tributaries export nutrients, carbon, and contaminants downstream, they also transform these substances. Phosphorous and nitrogen arrive at downstream waters having already been cycled, or taken up and transformed by living organisms, many times in headwater and smaller tributaries. Report at 4–19 to 4–20, 6–3 to 6–4 (citing J.R. Webster, and B.C. Patton, "Effects of watershed perturbation on stream potassium and calcium dynamics," *Ecological Monographs* 49:51–72 (1979); J.D. Newbold, *et al.*, "Measuring nutrient spiraling in streams," *Canadian Journal of Fisheries and Aquatic Sciences* 38:860–863 (1981); J. Elwood, *et al.*, "Resource spiraling: An operational paradigm for analyzing lotic ecosystems," *in* T.D. Fontaine and S.M. Bartell, ed., *Dynamics of Lotic Ecosystems* (Ann Arbor, MI: Ann Arbor Science, 1983), pp. 3–23; S.H. Ensign, and M.W. Doyle, "Nutrient Spiraling in Streams and River Networks," *Journal of Geophysical Research Biogeosciences* 111:G04009 (2006)). In addition, some of the nutrient that is taken up as readily available inorganic forms is released back to the water as organic forms that are less available for biotic uptake. *Id.* at 4–20 (citing P.J. Mulholland, *et al.*, "Production of Soluble, High Molecular Weight Phosphorus and Its Subsequent Uptake by Stream Detritus," *Verhandlungen des Internationalen Verein Limnologie* 23:1190–1197 (1988); S.P. Seitzinger, *et al.*, "Bioavailability of DON from Natural and Anthropogenic Sources to Estuarine Plankton," *Limnology and Oceanography* 47:353–366 (2002)). Similarly, nutrient incorporated into particulates is not entirely regenerated, but accumulates in longitudinally increasing particulate loads (i.e. increases moving downstream). *Id.* at 4–20 (citing J.L Merriam, *et al.*, "Characterizing Nitrogen Dynamics, Retention and Transport in a Tropical Rainforest Stream Using an in situ N–15 Addition," *Freshwater Biology* 47:143–160 (2002); M.R. Whiles, and W.K. Dodds, "Relationships between Stream Size, Suspended Particles, and Filter-Feeding Macroinvertebrates in a Great Plains Drainage Network," *Journal of Environmental Quality* 31:1589–1600 (2002); R.O. Hall, *et al.*, "Hydrologic Control of Nitrogen Removal, Storage, and Export in a Mountain Stream," *Limnology and Oceanography* 54:2128–2142 (2009)). Headwater streams have seasonal cycles in the concentrations of phosphorous and nitrogen that are delivered downstream by accumulating nutrient derived from temporarily growing streambed biomass. *Id.* (citing P.J. Mulholland, and W.R. Hill, "Seasonal Patterns in Streamwater Nutrient and Dissolved Organic Carbon Concentrations: Separating Catchment Flow Path and In-Stream Effects," *Water Resources Research* 33:1297–1306 (1997); P.J. Mulholland, "The Importance of In-stream Uptake for Regulating Stream Concentrations and Outputs of N and P from a Forested Watershed: Evidence from Long-Term Chemistry Records for Walker Branch Watershed," *Biogeochemistry* 70:403–426 (2004)). Such variations have been demonstrated to affect downstream productivity. *Id.* (citing P.J. Mulholland, *et al.*, "Longitudinal Patterns of Nutrient Cycling and Periphyton Characteristics in Streams: a Test of Upstream-Downstream Linkage," *Journal of the North American Benthological Society* 14:357–370 (1995)). Nitrification, the microbial transformation of ammonium to nitrate, affects the form of downstream nutrient delivery. Nitrification occurs naturally in undisturbed headwater streams, but increases sharply in response to ammonium inputs, thereby reducing potential ammonium toxicity from pollutant inputs. *Id.* (citing Newbold, *et al.*, "Phosphorus Dynamics in a Woodland Stream Ecosystem: a Study of Nutrient Spiraling," *Ecology* 64:1249–1265 (1983); S.C. Chapra, *Surface Water Quality Modeling* (McGraw Hill, 1996); E.S. Bernhardt, *et al.*, "Whole-system Estimates of Nitrification and Nitrate Uptake in Streams of the Hubbard Brook Experimental Forest," *Ecosystems* 5:419–430 (2002)). Denitrification, the removal of nitrate from stream water through transformation to atmospheric nitrogen, is widespread among headwater streams; research indicates that small, unimpacted tributaries can reduce up to 40% of downstream nitrogen delivery through denitrification. *Id.* at 4–20 to 4–21 (citing P.J. Mulholland, *et al.*, "Stream Denitrification across Biomes and Its Response to Anthropogenic Nitrate Loading," *Nature* 452:202–205 (2008)). Small tributaries also affect the downstream delivery of nutrients through abiotic processes. Streams can reduce phosphorus concentrations through sorption (i.e., "sticking") to stream sediments. *Id.* at 4–21 (citing J.L. Meyer, "The Role of Sediments and Bryophytes in Phosphorus Dynamics in a Headwater Stream Ecosystem," *Limnology and Oceanography* 24:365–375 (1979)). This is particularly beneficial to downstream chemical integrity where phosphorus sorbs to contaminants such as metal hydroxide precipitates. *Id.* (citing J.A. Simmons, "Phosphorus Removal by Sediment in Streams Contaminated with Acid Mine Drainage," *Water Air and Soil Pollution* 209:123–132 (2010)).

Tributaries also store significant amounts of nutrients and carbon, functioning as important sinks (lags) for river networks so that they do not reach downstream traditional navigable waters, interstate waters, or the territorial seas. Small tributary streams in particular often have the greatest effect on downstream water quality, in terms of storage and reducing inputs to downstream waters. For instance, uptake and transformation of inorganic nitrogen often occurs most rapidly in the smallest tributaries. *See, e.g., id.* at 4–18 (citing B.J. Peterson, *et al.*, "Control of Nitrogen Export from Watersheds by Headwater Streams," *Science* 292:86–90 (2001)). Small tributaries affect the downstream delivery of nutrients such as phosphorus through abiotic processes; such streams can reduce phosphorus concentrations by sorption to stream sediments.

Tributaries can also serve as a temporary or permanent source or sink for contaminants, for instance substances like metals, sodium, and even dead fish carcasses that adversely affect organisms when occurring at excessive or elevated concentrations to reduce the amounts that reach downstream traditional navigable waters, interstate waters, or the territorial seas. The transport of contaminants to downstream waters can impact water quality downstream, if they are not stored in tributaries. *See, e.g., id.* at 4–26 (citing X. Wang, *et al.*, "Water Quality Changes as a Result of Coalbed Methane Development in a Rocky Mountain Watershed," *Journal of the American Water Resources Association* 43:1383–1399 (2007)). Tributaries can also serve as at least a temporary sink for contaminants that would otherwise impair downstream water quality. *See, e.g., id.* at 133–134 (citing W.L. Graf, *Plutonium and the Rio Grande: Environmental Change and Contamination in the Nuclear Age* (New York: Oxford University Press, 1994)).

The distance and extent of metal contaminant transport was shown in separate studies in the upper Arkansas River in Colorado, and Clark Fork River in Montana, where past mining activities impacted the headwater tributaries. River bed sediments showed that metals originating from the mining and smelting areas in the headwaters were reaching water bodies up to 550 km downstream. *Id.* at 4–26 to 4–27 (citing E.V. Axtmann, and S.N. Luoma, "Large scale Distribution of Metal Contamination in the Fine-grained Sediments of the Clark Fork River, Montana, USA," *Applied Geochemistry* 6:75–88 (1991); B.A. Kimball, *et al.*, "Effects of Colloids on Metal Transport in a River Receiving Acid Mine Drainage, Upper Arkansas River, Colorado, USA," *Applied Geochemistry* 10:285–306 (1995)).

Military studies of the distribution, transport, and storage of radionuclides (*e.g.*, plutonium, thorium, uranium) have provided convincing evidence for distant chemical

connectivity in river networks because the natural occurrence of radionuclides is extremely rare. From 1942 to 1952, prior to the full understanding of the risks of radionuclides to human health and the environment, plutonium dissolved in acid was discharged untreated into several intermittent headwater streams that flow into the Rio Grande at the Los Alamos National Laboratory, New Mexico. *Id.* at 4–28 (citing W.L. Graf, *Plutonium and the Rio Grande: Environmental Change and Contamination in the Nuclear Age* (New York: Oxford University Press, 1994); S.L. Reneau, *et al.*, "Geomorphic Controls on Contaminant Distribution along an Ephemeral Stream," *Earth Surface Processes and Landforms* 29:1209–1223 (2004)). Also during this time, nuclear weapons testing occurred west of the upper Rio Grande near Socorro, New Mexico (Trinity blast site) and in Nevada, where fallout occurred on mountainous areas with thin soils that are readily transported to headwater streams in the upper Rio Grande basin. The distribution of plutonium within the Rio Grande illustrates how headwater streams transport and store contaminated sediment that has entered the basin through fallout and from direct discharge. Los Alamos Canyon, while only representing 0.4% of the drainage area at its confluence with the Rio Grande, had a mean annual bedload contribution of plutonium almost seven times that of the mainstem. *Id.* (citing Graf 1994). Much of the bedload contribution occurred sporadically during intense storms that were out of phase with flooding on the upper Rio Grande. Total estimated contributions of plutonium between the two sources to the Rio Grande were approximately 90% from fallout to the landscape and 10% from direct effluent discharge at Los Alamos National Laboratory. *Id.* (citing Graf 1994).

C. Tributaries Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters

Tributaries are biologically linked to downstream waters through the movement of living organisms or their reproductive propagules, such as eggs or seeds. For organisms that drift with water flow, biological connections depend on hydrological connections. However, many aquatic organisms are capable of active movement with or against water flow, and others disperse actively or passively over land by walking, flying, drifting, or "hitchhiking." All of these different types of movement form the basis of biological connectivity between headwater tributaries and downstream waters.

Headwater tributaries increase the amount and quality of habitat available to aquatic organisms. Under adverse conditions, small tributaries provide safe refuge, allowing organisms to persist and recolonize downstream areas once adverse conditions have abated. *See, e.g.*, Report at 4–29 (citing J.L. Meyer and J.B. Wallace, "Lost Linkages and Lotic Ecology: Rediscovering Small Streams," Pages 295–317 *in* M.C. Press, N. J. Huntly, and S. Levin, editors. Ecology: *Achievement and Challenge* (Oxford, UK: Blackwell Science, 2001); A. Meyer *et al.*, "The Effect of Low Flow and Stream Drying on the Distribution and Relative Abundance of the Alien Amphipod, *Echinogammarus berilloni* (Catta, 1878) in a Karstic Stream System (Westphalia, Germany)," *Crustaceana* 77:909–922 (2004); A.D. Huryn *et al.*, "Landscape Heterogeneity and the Biodiversity of Arctic Stream Communities: A Habitat Template Analysis," *Canadian Journal of Fisheries and Aquatic Sciences* 62:1905–1919 (2005)). Use of tributaries by salmon and other anadromous fish for spawning is well-documented, but even non-migratory species can travel great distances within the river and tributary networks. *See, e.g., id.* at 4–31 (citing O.T. Gorman, "Assemblage Organization of Stream Fishes: The Effects of Rivers on Adventitious Streams," *American Naturalist* 128(4): 611 616 (1986); A. L. Sheldon, "Conservation of Stream Fishes: Patterns of Diversity, Rarity, and Risk," *Conservation Biology* 2:149–156 (1988); N.P. Hitt and P.L. Angermeier, "Evidence for Fish Dispersal from Spatial Analysis of Stream Network Topology," *Journal of the North American Benthological Society* 27:304–320 (2008)). Tributaries also serve as an important source of food for biota in downstream rivers. Tributaries export plankton, vegetation, fish eggs, insects, invertebrates like worms or crayfish, smaller fish that originate in upstream tributaries and other food sources that drift downstream to be consumed by other animals. *See, e.g., id* at 4–29 (citing D.J. Progar and A.R. Modenko, "Insect Production from Temporary and Perennially Flowing Headwater Streams in Western Oregon," *Journal of Freshwater Ecology* 17:391–407 (2002)). For example, many fish feed on drifting insects, and numerous studies document the downstream drift of stream invertebrates that them are eaten by fish in larger rivers. *See, e.g., id.* at 4–29 to 4–30 (citing S. Nakano and M. Murakami, "Reciprocal Subsidies: Dynamic Interdependence between Terrestrial and Aquatic Food Webs," Proceedings *of the National Academy of Sciences USA* 98:166 170 (2001); M.S. Wipfli and D.P. Gregovich, "Export of Invertebrates and Detritus from Fishless Headwater Streams in Southeastern Alaska: Implications for Downstream Salmonid Production," *Freshwater Biology* 47:957–969 (2002)).

Biological connectivity also allows gene flow, or genetic connectivity, among tributary and river populations. Gene flow is needed to maintain genetic diversity in a species, a basic requirement for that species to be able to adapt to environmental change. Populations connected by gene flow have a larger breeding population size, making them less prone to the deleterious effects of inbreeding and local extinction. *Id.* at 4–33 (citing R. Lande and S. Shannon, "The role of genetic variation in adaptation and population persistence in a changing environment," *Evolution* 50:434–437 (1996)). Genetic connectivity exists at multiple scales and can extend beyond one a single river catchment, and for species capable of long distance movement (such as salmon), reveals complex interactions among spatially distant populations of aquatic organisms *Id.* (citing J.M. Hughes, *et al.*, "Genes in Streams: Using DNA to Understand the Movement of Freshwater Fauna and Their Riverine Habitat," *Bioscience* 59:573–583 (2009); C.D. Anderson, "Considering spatial and temporal scale in landscape-genetic studies of gene flow," *Molecular Ecology* 19:3565–3575 (2010)).

D. Headwater Tributaries Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

As discussed above, the scientific literature supports the conclusion that tributaries, including headwater streams, have a significant nexus to downstream waters based on their contribution to the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters. Headwater tributaries, the small streams at the uppermost reaches of the tributary network, are the most abundant streams in the United States. *See, e.g., id.* at 4–2 (citing T.L. Nadeau and M.C. Rains, "Hydrological connectivity between headwater streams and downstream waters: How science can inform policy," *Journal of the American Water Resources Association* 43:118–133 (2007)). Collectively, they help shape the chemical, physical, and biological integrity of downstream waters, and provide many of the same functions as non headwater streams. *See, e.g., id.* at 4–7 to 4 8, 4–1. For example, headwater streams reduce the amount of sediment delivered to downstream waters by trapping sediment from water and runoff. *See, e.g.*, M. Dietorich and N.H. Anderson, "Dynamics of Abiotic Parameters, Solute Removal and Sediment Retention in Summer Dry Headwater Stream of Western Oregon," *Hydrobiologia* 379: 1–15 (1998). Headwater streams shape river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. They are also responsible for most nutrient cycling and removal, and thus transforming and changing the amount of nutrients delivered to downstream waters. *See, e.g.*, Report at 4 18 (citing B.J. Peterson, *et al.*, "Control of Nitrogen Export from Watersheds by Headwater Streams," *Science* 292: 86–90 (2001)). A close connection exists between the water quality of these streams and the water quality of traditional navigable waters, interstate waters, and the territorial seas. *See, e.g.*, State of Ohio Environmental Protection Agency, *Nonpoint Source Impacts on Primary Headwater Streams* (Columbus, OH: Ohio Environmental Protection Agency, 2003). Activities such as discharging a pollutant into one part of the tributary system are well-documented to affect other parts of the system, even when the point of discharge is far upstream from the navigable water that experiences the effect of the discharge. *See, e.g.*, F.M. Dunnivant and E. Anders, *A Basic Introduction To Pollutant Fate and Transport: An Integrated Approach With Chemistry, Modeling, Risk Assessment, and Environmental Legislation* (Hoboken, NJ: John Wiley & Sons, Inc., 2006).

Headwater streams provide unique habitat and protection for amphibians, fish, and other aquatic or semi-aquatic species living in and near the stream that may use the downstream waters for other portions of their life stages. *See, e.g.*, Report at 1–8; J.L. Meyer, *et al.*, "The Contribution of Headwater Streams to Biodiversity in River Networks," *Journal of the American Water Resources*

Association 43(1): 86–103 (2007). They also serve as migratory corridors for fish. Tributaries can improve or maintain biological integrity and can control water temperatures in the downstream waters. *See, e.g.,* Report at 4–14 (citing J.L. Ebersole, *et. al.,* "Cold water patches in warm streams: Physicochemical characteristics and the influence of shading," *Journal of the American Water Resources Association* 39:355–368 (2003); B. Gardner, and P.J. Sullivan, "Spatial and temporal stream temperature prediction: Modeling nonstationary temporal covariance structures," *Water Resources Research* 40:1 9 (2004); B.R. Johnson, *et al.,* "Use of spatially explicit physicochemical data to measure downstream impacts of headwater stream disturbance," *Water Resources Research* 46:W09526 (2010)). Headwater streams also provide refuge habitat for riverine organisms seeking protection from temperature extremes, flow extremes, low dissolved oxygen, high sediment levels, or the presence of predators, parasites, and competitors. *See, e.g., id.* at 4–32 (citing J.C. Scrivener, *et al.,* "Juvenile Chinook salmon (Oncorhynchus tshawytscha) utilization of Hawks Creek, a small and nonnatal tributary of the Upper Fraser River," *Canadian Journal of Fisheries and Aquatic Sciences* 51:1139 1146 (1994); R.A. Curry, *et al.,* "Use of small streams by young brook trout spawned in a lake," *Transactions of the American Fisheries Society* 126:77–83 (1997); A.M Piros, *et al.,* "Seasonal changes in fish community structure of intermittent streams in the middle reaches of the Guadiana basin, Portugal," *Journal of Fish Biology* 54:235–249 (1999); M.J Bradford, *et al.,* "Ecology of juvenile Chinook salmon in a small nonnatal stream of the Yukon River drainage and the role of ice conditions on their distribution and survival," *Canadian Journal of Zoology Revue Canadienne De Zoologie* 79:2043 2054 (2001); M.A. Cairns, *et al.,* "Influence of summer stream temperatures on black spot infestation of juvenile coho salmon in the Oregon Coast Range," *Transactions of the American Fisheries Society* 134:1471–1479 (2005); Wigington, P. J., *et al.,* "Coho salmon dependence on intermittent streams," *Frontiers in Ecology and the Environment* 4:513–518 (2006)). Headwater streams serve as a source of food materials such as insects, larvae, and organic matter to nourish the fish, mammals, amphibians, and other organisms in downstream streams, rivers, and lakes. *See, e.g., id.* at 4–22, 4–24 (citing S.G., Fisher, and G.E. Likens, "Energy flow in Bear Brook, New Hampshire: An integrative approach to stream ecosystem metabolism," *Ecological Monographs* 43:421–439 (1973); J.L. Meyer, "The microbial loop in flowing waters," *Microbial Ecology* 28:195–199 (1994); J.B. Wallace, *et al.,* "Multiple trophic levels of a forest stream linked to terrestrial litter inputs," *Science* 277:102–104 (1997); R.O. Hall, and J.L. Meyer, "The trophic significance of bacteria in a detritus-based stream food web," *Ecology* 79:1995–2012 (1998); R.O. Hall, *et al.,* "Organic matter flow in stream food webs with reduced detrital resource base," *Ecology* 81:3445–3463 (2000); T. Gomi, *et al.,* "Understanding processes and downstream linkages of headwater systems," *Bioscience* 52:905–916 (2002); C. Augspurger, *et al.,* "Tracking carbon flow in a 2-week-old and 6-week-old stream biofilm food web," *Limnology and Oceanography* 53:642–650 (2008)). Disruptions in these biological processes affect the ecological functions of the entire downstream system. *See, e.g.,* L.A. Kaplan, *et al.,* "Patterns of Dissolved Organic Carbon in Transport," *Limnology and Oceanography* 25: 1034–1043 (1980); R.L. Vannote, *et. al.,* "The River Continuum Concept," *Canadian Journal of Fisheries and Aquatic Sciences* 37: 130–37 (1980). Headwater streams can help to maintain base flow in the larger rivers downstream, which is particularly important in times of drought. *See, e.g.,* Report at 4–4, 4–66 (citing P.D. Brooks, and M.M. Lemon, "Spatial variability in dissolved organic matter and inorganic nitrogen concentrations in a semiarid stream, San Pedro River, Arizona," *Journal of Geophysical Research Biogeosciences* 112:G03035.D (2007); Tetzlaff, and C. Soulsby, "Sources of baseflow in larger catchments—using tracers to develop a holistic understanding of runoff generation," *Journal of Hydrology* 359:287 302 (2008)). At the same time, the network of headwater streams can regulate the flow of water into downstream waters, mitigating low flow and high flow extremes, reducing local and downstream flooding, and preventing excess erosion caused by flooding. *See, e.g.,* United States, U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/233046/2008; *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi arid American Southwest* (Washington, DC: U.S. EPA and USDA/ARS Southwest Watershed Research Center, Levick *et al.,* 2008) (Levick *et al.* 2008).

F. Ephemeral and Intermittent Tributaries Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Tributaries do not need to flow perennially to have a significant nexus to downstream waters. Approximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally; ephemeral and intermittent streams are particularly prevalent in the arid and semi-arid Southwest, where they account for over 81% of streams. Levick *et al.* 2008. Despite their intermittent or ephemeral flow, these streams nonetheless perform the same important ecological and hydrological functions documented in the scientific literature as perennial streams, through their movement of water, nutrients, and sediment to downstream waters. *Id.* The importance of intermittent and ephemeral streams is documented in a 2008 peer-reviewed report by EPA's Office of Research and Development and the U.S. Department of Agriculture's Agricultural Research Service, which addresses the hydrological and ecological significance of ephemeral and intermittent streams in the arid and semi-arid Southwestern United States and their connections to downstream waters; the report is a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems. *Id.*

Intermittent and ephemeral streams are chemically, physically, and biologically connected to downstream waters, and these connections have effects downstream. *See, e.g., id.* In some areas, stormflows channeled into alluvial floodplain aquifers by intermittent and ephemeral streams are the major source of annual streamflow in rivers. Perennial flows are not necessary for chemical connections. Periodic flows in ephemeral or intermittent tributaries can have a strong influence on biogeochemistry by connecting the channel and other landscape elements. *See, e.g.,* Report at 4–16 (citing H.M. Valett, *et. al.,* "Biogeochemical and Metabolic Responses to the Flood Pulse in a Semiarid Floodplain," *Ecology* 86(1): 220–234 (2005)). This episodic connection can be very important for transmitting a substantial amount of material into downstream rivers. *See, e.g., id.* (citing Nadeau and Rains (2007)). Ephemeral desert streams have been shown to export particularly high sediment loadings. *See, e.g., id.* at 4–10 (citing M.A. Hassan, "Observations of Desert Flood Bores," *Earth Surface Processes and Landforms* 15:481–485 (1990)). Ephemeral streams can also temporarily and effectively store large amounts of sediment that would otherwise wash downstream, contributing to the maintenance of downstream water quality and productive fish habitat. *See, e.g.,* S.H Duncan, *et al.,* "Transport of Road Surface Sediment through Ephemeral Stream Channels," *Water Resources Bulletin* 23(1): 113–119 (1987). This temporary storage of sediment thus helps maintain the chemical and biologic integrity of downstream waters.

The Report provides case studies of prairie streams and Southwest intermittent and ephemeral streams, two stream types whose jurisdictional status has been called into question in the past. These case studies highlight the importance of these streams to downstream waters, despite their small size and ephemeral or intermittent flow regime. Prairie streams are frequently subjected to the extremes of drying and flooding, and intermittent or flashy hydrology is prevalent in river networks throughout most of the Great Plains. Report at 4–40 (citing W.J. Matthews, "North American Prairie Streams as Systems for Ecological Study," *Journal of the North American Benthological Society* 7:387–409 (1988); A.V. Zale *et al.,* "The Physicochemistry, Flora, and Fauna of Intermittent Prairie Streams: A Review of the Literature," *United States Fish and Wildlife Service Biological Report* 89:1–44 (1989); N.L. Poff, "A Hydrogeography of Unregulated Streams in the United States and an Examination of Scale Dependence in Some Hydrological Descriptors," *Freshwater Biology* 36:71–91 (1996); W.K. Dodds, *et al.,* "Life on the Edge: The Ecology of Great Plains Prairie Streams," *Bioscience* 54:205–216 (2004)). Prairie streams typically represent a collection of spring-fed, perennial pools and reaches, embedded within larger, intermittently flowing segments. *Id.* at 4–55 (citing T.R. Labbe, and K.D. Fausch, "Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales," *Ecological Applications* 10:1774–1791 (2000)). These streams have

significant chemical, physical, and biological connections to downstream waters, despite extensive alteration of historical prairie regions by agriculture, water impoundment, water withdrawals, and other human activities, and the challenges these alterations create for assessing connectivity. *Id.* (citing W.J. Matthews, and H.W. Robinson, "Influence of Drainage Connectivity, Drainage Area and Regional Species Richness on Fishes of the Interior Highlands in Arkansas," *American Midland Naturalist* 139:1–19 (1998); W.K. Dodds, *et al.*, "Life on the Edge: The Ecology of Great Plains Prairie Streams," *Bioscience* 54:205–216 (2004)). The most notable connections are via flood propagation, contaminated sediment transport, nutrient retention, and the extensive transport and movement of fish species (including eggs and larvae) throughout these networks. *Id.* at 4–55 (citing H.F. Matthai, *Floods of June 1965 in South Platte River Basin, Colorado,* Water Supply Paper 1850–B (Washington, DC: U.S. Geological Survey, 1969); A.J. Horowitz, *et al.*, "The Effect of Mining on the Sediment-trace Element Geochemistry of Cores from the Cheyenne River Arm of Lake Oahe, South Dakota, USA," *Chemical Geology* 67:17–33 (1988); DC Marron, "The Transport of Mine Tailings as Suspended Sediment in the Belle Fourche River, West-central South Dakota, USA," *International Association of Hydrologic Sciences* 184:19–26 (1989); W.K. Dodds, *et al.*, "Nitrogen Transport from Tallgrass Prairie Watersheds," *Journal of Environmental Quality* 25:973–981 (1996); K.D. Fausch, and K.R. Bestgen, "Ecology of Fishes Indigenous to the Central and Southwestern Great Plains," *in* F.L. Knopf and F.B. Samson, ed., *Ecology and Conservation of Great Plains Vertebrates,* (New York, NY: Springer-Verlag, 1997), pp. 131–166; S.P. Platania, and C.S. Altenbach, "Reproductive Strategies and Egg Types of Seven Rio Grande Basin Cyprinids," *Copeia* 1998:559–569 (1998); K.M. Fritz, and W.K. Dodds, "Resistance and Resilience of Macroinvertebrate Assemblages to Drying and Flood in a Tallgrass Prairie Stream System," *Hydrobiologia* 527:99–112 (2004); K.M. Fritz, and W.K. Dodds, "Harshness: Characterization of Intermittent Stream Habitat over Space and Time," *Marine and Freshwater Research* 56:13–23 (2005); N.R. Franssen, *et al.*, "Effects of Floods on Fish Assemblages in an Intermittent Prairie Stream," *Freshwater Biology* 51:2072–2086 (2006); R.B. Alexander, *et al.*, "Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi River Basin," *Environmental Science & Technology* 42:822–830 (2008); J.S. Perkins, and K.B. Gido, "Stream Fragmentation Thresholds for a Reproductive Guild of Great Plains Fishes," *Fisheries* 36:371–383 (2011)).

Southwestern intermittent and ephemeral streams exert strong influences on the structure and function of downstream waters, and the case study (included in the Report) echoes many of the findings of the functions of intermittent and ephemeral tributaries generally, which are described above. The case study focuses on the heavily studied San Pedro River, located in southeast Arizona, in particular, as a representative example of the hydrological behavior and the connectivity of rivers in the Southwest, but also examines evidence relevant to other Southwestern streams. The chemical, physical, and biological connections of Southwestern intermittent and ephemeral streams highlighted in the case study are summarized below. Flows from ephemeral streams are one of the major drivers of the dynamic hydrology of Southwest rivers (particularly of floods during monsoon seasons. *Id.* at 4–60, 4–67 (citing DC Goodrich, *et al.*, "Linearity of Basin Response as a Function of Scale in a Semiarid Watershed," *Water Resources Research* 33:2951–2965 (1997); F. Yuan, and S. Miyamoto, "Characteristics of Oxygen-18 and Deuterium Composition in Waters from the Pecos River in American Southwest," *Chemical Geology* 255:220–230 (2008)). Downstream river fishes and invertebrates are adapted to the variable flow regimes that are influenced strongly by ephemeral tributary systems, which provide isolated pools as refuges for fish during dry periods. *Id.* at 4–68 to 4–69 (citing K.R. John, "Survival of Fish in Intermittent Streams of the Chirichua Mountains, Arizona" *Ecology* 45:112–119 (1964); T.R. Labbe, and K.D. Fausch, "Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales," *Ecological Applications* 10:1774–1791 (2000); J.N. Rinne, and D. Miller, "Hydrology, Geomorphology and Management: Implications for Sustainability of Native Southwestern Fishes," *Reviews in Fisheries Science* 14:91–110 (2006); D.A. Lytle, *et al.*, "Evolution of Aquatic Insect Behaviors across a Gradient of Disturbance Predictability," *Proceedings of the Royal Society—Series B* 275:453–462 (2008)). Ephemeral tributaries in the Southwest also supply water to mainstem river alluvial aquifers, which aids in the sustaining river baseflows downstream. *Id.* at 4–64 (citing DC Goodrich, *et al.*, "Linearity of Basin Response as a Function of Scale in a Semiarid Watershed," *Water Resources Research* 33:2951–2965 (1997); J.B. Callegary, *et al.*, "Rapid Estimation of Recharge Potential in Ephemeral-Stream Channels using Electromagnetic Methods, and Measurements of Channel and Vegetation Characteristics," *Journal of Hydrology* 344:17–31 (2007)). Ephemeral tributaries export sediment downstream during major hydrologic events; the sediment, in turn, contributes to materials that comprise alluvial aquifers and shape the fluvial geomorphology (the science of how rivers and streams form given the landscape setting) of downstream waters. *Id.* at 4–65 (citing G.C. Nanson, and J.C. Croke, "A Genetic Classification of Floodplains," *Geomorphology* 4:459–486 (1992)). The nutrient and biogeochemical integrity of downstream Southwestern rivers, such as the San Pedro River, is heavily influenced by nutrient export from ephemeral tributaries after storm flow events. *Id.* at 4–18, 4–66 (citing P.D. Brooks, and M.M. Lemon, "Spatial Variability in Dissolved Organic Matter and Inorganic Nitrogen Concentrations in a Semiarid Stream, San Pedro River, Arizona," *Journal of Geophysical Research-Biogeosciences* 112:G03S05 (2007)). Extensive downstream river riparian communities are supported by water, sediment and nutrients exported to the river from ephemeral tributaries; these riparian communities have a profound influence on the river attributes through shading, allochthonous (originating from outside of the channel) inputs of organic matter, detritus, wood, and invertebrates to the river. *Id.* at 4–65 to 4–66 (citing S.V. Gregory, *et al.*, "An Ecosystem Perspective of Riparian Zones: Focus on Links between Land and Water," *Bioscience* 41:540–551 (1991); R.J. Naiman, *et al., Riparia: Ecology, Conservation, and Management of Streamside Communities* (Burlington, MA: Elsevier, Inc., 2005); J.C. Stromberg, *et al.*, "Effects of Stream Flow Intermittency on Riparian Vegetation of a Semiarid Region River (San Pedro River, Arizona)," *River Research and Applications* 21:925–938 (2005), M. Baillie, *et al.*, "Quantifying Water Sources to a Semiarid Riparian Ecosystem, San Pedro River, Arizona," *Journal of Geophysical Research* 112:G03S02 (2007); National Research Council, *Riparian Areas: Functions and Strategies for Management* (Washington, DC: National Academy Press, 2002)).

E. Tributary Lakes, Ponds, and Wetlands Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

As discussed elsewhere in this preamble, riparian and floodplain wetlands have a significant nexus to downstream waters, and wetlands that are tributaries are a subset of such wetlands. The fact that a wetland tributary is in-stream often enhances its ability to filter pollutants and contaminants that would otherwise make it downstream; in-stream wetlands also attenuate floodwaters. Lakes and ponds serve many important functions that affect the chemical, physical, and biological conditions downstream. Lake tributaries can act as sinks, storing floodwaters, sediment, and nutrients, as these materials have the opportunity to settle out, at least temporarily, as water moves through the lake to downstream waters. *See, e.g.,* R.W. Phillips, *et al.*, "Connectivity and Runoff Dynamics in Heterogeneous Basins," *Hydrological Processes* 25(19): 3061–3075 (2011). The attenuation of floodwaters can also maintain stream flows downstream. *Id.* Lakes, as with other tributaries, can also act as sources, contributing flow, nutrient, sediment, and other materials downstream. Total Maximum Daily Loads (TMDLs) for nutrients have been established for many in-stream lakes across the country in recognition of the ability of lakes to transport nutrients downstream, contributing to downstream impairments. *See, e.g.* Maine Department of Environmental Protection, *Phosphorus Control Action Plan and Total Maximum Daily (Annual Phosphorous) Load Report, Daigle Pond, New Canada, Aroostook County, Maine,* Daigle Pond PCAP—TMDL Report, Maine DEPLW—0789 (Maine DEP, 2006); U.S. Environmental Protection Agency, "Section 6 Echo Park Lake TMDLs," *Los Angeles Area Lakes TMDLs, January 2011 Revised Draft* (2011). Lakes can also serve as habitat for species that then move downstream. For instance, brook trout that are stocked in headwater

lakes in Idaho and Montana are capable of invading most downstream habitat, including through very steep channel slopes and waterfalls. S.B. Adams, *et al.*, "Geography of Invasion in Mountain Streams: Consequences of Headwater Lake Fish Introductions," Ecosystems 4(4): 296–307. These non-native species can then affect the biological integrity of downstream waters by impacting populations of native fish species, such as cutthroat trout, downstream. *See, e.g.*, J.B. Dunham, *et al.*, "Alien Invasions in Aquatic Ecosystems: Toward an Understanding of Brook Trout Invasions and Potential Impacts on Inland Cutthroat Trout in Western North America," *Reviews in Fish Biology and Fisheries* 12(4): 373–391 (2002). For example, non-native trout were introduced in headwater tributary lakes to the Little Kern River in the southern Sierra Nevada and dispersed downstream, causing the near-extinction of the native Little Kern golden trout. R.A. Knapp, and K.R. Matthews, "Effects on Nonnative Fishes on Wilderness Lake Ecosystems in the Sierra Nevada and Recommendations for Reducing Impacts," in D. N. Cole, *et al.*, ed., *Wilderness Science in a Time of Change Conference, Volume 5: Wilderness Ecosystems, Threats, and Management, Missoula, Montana, May 23–27, 1999*, Proceedings RMRS–P–15–VOL–5 (Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, 2000), 312–317. These studies demonstrate the ability of organisms to travel from tributary lakes to downstream waters, which is not limited to just non-native species; many other species can also move downstream and back again.

One type of wetlands located in-stream are unidirectional wetlands that are connected to the river network through a channel (e.g., wetlands that serve as stream origins; a definition of "unidirectional wetlands" can be found in part I section 4.B above). These tributary wetlands are generally exemplary of tributary wetlands as a whole, and because the Report focuses in part on these wetlands, they are discussed here in further detail. These are wetlands from which a stream channel originates. Report at 5–1 to 5–2. They are part of the stream network itself, and along with first- and second-order streams, form the headwaters of the river network. Such wetlands have a direct hydrologic connection to the tributary network via unidirectional flow from wetland to the headwater stream. Channel origin wetlands generally have important chemical, physical, and biological effects on (a)(1) through (a)(3) waters, including hydrologic, water quality, and habitat functions, regardless if the outflow from the wetland to the stream is perennial, intermittent, or ephemeral. *Id.* Like other wetlands, wetlands that serve as stream origins can transport channel-forming sediment and woody debris, transport stored organic matter, remove and transform pollutants and excess nutrients such as nitrogen and phosphorus, attenuate and store floodwaters, contribute to stream baseflow through groundwater recharge, and provide habitat for breeding fish, amphibians, reptiles, birds, and other aquatic and semi-aquatic species that move from the wetlands to the river network. *Id.* at 5–41.

Wetlands that serve as stream origins connect via perennial, intermittent, or ephemeral drainages to river networks. *Id.* at 5–22 to 5–23 (citing M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008); T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA Catchment," *Journal of the American Water Resources Association* 47:337–349 (2011)). Regardless of the permanence of flow, such wetlands have an impact on downstream water. *Id.* at 5–1 to 5–2. Wetland seeps, for example, can form where groundwater discharges from breaks in slope. *Id.* at 5–21 (citing B.R. Hall, *et al.*, "Environmental Influences on Plant Species Composition in Ground-water Seeps in the Catskill Mountains of New York," *Wetlands* 21:125–134 (2001); M.A. O'Driscoll, and D.R. DeWalle, "Seeps Regulate Stream Nitrate Concentration in a Forested Appalachian Catchment," *Journal of Environmental Quality* 39:420–431 (2010)). They often have perennial connections to the stream, providing important sources of water downstream, particularly during summer baseflow. *Id.* at 5–22 (citing T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA Catchment," *Journal of the American Water Resources Association* 47:337–349 (2011)). In Maine, for example, seeps were found to provide 40 to 80% of stream water during baseflow periods. *Id.* In other cases, surface connections between channel origin wetlands and streams are intermittent or ephemeral. For example, California vernal pools spill water a great number of days during the years via channels, providing water downstream. *Id.* (citing M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008)). In addition to surface water connections, groundwater flow can hydrologically connect wetlands that serve as stream origins with the stream network. *Id.* at 5–23.

The hydrologic connection of the wetland to the stream can affect streamflow by altering baseflow or storm flow through several mechanisms, including surface storage and groundwater recharge. *Id.* at 5–25. Studies at the larger scale have shown that wetlands, by storing water, reduce peak streamflows and, thus, downstream flooding. *Id.* (citing J. Jacques, and D. L. Lorenz, *Techniques for Estimating the Magnitude and Frequency of Floods of Ungauged Streams in Minnesota*, Report 87–4170 (Washington, DC: U.S. Geological Survey, 1988); Vining, K.C., *Simulation of Streamflow and Wetland Storage, Starkweather Coulee Subbasin, North Dakota, Water Years 1981–98*, Water Resources Investigations Report 02–4113 (Bismarck, ND: U.S. Geological Survey, 2002), 33 p.; P. McEachern, *et al.*, "Landscape Control of Water Chemistry in Northern Boreal Streams of Alberta," *Journal of Hydrology* 323:303–324 (2006); R.A. Gleason, *et al. Estimating Water Storage Capacity of Existing and Potentially Restorable Wetland Depressions in a Subbasin of the Red River of the North*, U.S. Geological Survey Open-File Report 2007–1159 (Reston, VA: U.S. Geological Survey, 2007), 36 p.). In some cases, however, where wetlands that serve as stream origins are already saturated prior to rainfall, they can convey stormwater quickly downstream and thus actually increase flood peaks. *Id.* at 227 (citing Bay, R., "Runoff from Small Peatland Watersheds," *Journal of Hydrology* 9:90–102 (1969); A. Bullock, and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). This is because the wetland soil, if completely saturated, cannot store any additional water, making the wetland enable to store floodwater.

Wetlands that serve as stream origins have important chemical connections to downstream waters that affect the integrity of those waters. These wetlands contain diverse microbial populations that perform various chemical transformations, acting as source of compounds and influencing the water quality downstream. *Id.* at 5–28 (citing K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Sulfate-reducing bacteria found in some headwater wetlands produce methylated mercury, which is then transported downstream by surface flows. *Id.* (citing O.K. Linqvist, *et al.*, "Mercury in the Swedish Environment—Recent Research on Causes, Consequences, and Remedial Measures," *Water Air and Soil Pollution* 55:xi-xiii (1991); G. Mierle, and R. Ingram, "The Role of Humic Substances in the Mobilization of Mercury from Watersheds," *Water Air and Soil Pollution* 56:349–357 (1991); C.T. Driscoll, *et al.*, "The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes," *Water Air and Soil Pollution* 80:499–508 (1995); B.A. Branfireun, *et al.*, "In situ Sulphate Stimulation of Mercury Methylation in a Boreal Peatland: Toward a Link Between Acid Rain and Methylmercury Contamination in Remote Environments," *Global Biogeochemical Cycles* 13:743–750 (1999)). Wetlands, including those that serve as stream origins, are the principle sources of dissolved organic carbon (DOC) in forests to downstream waters. *Id.* (citing P.J. Mulholland, and E.J. Kuenzler, "Organic Carbon Export from Upland and Forested Wetland Watersheds," *Limnology and Oceanography* 24:960–966 (1979); N.R. Urban, *et al.*, "Export of Dissolved Organic Carbon and Acidity from Peatlands," *Water Resources Research* 25:1619–1628 (1989); B.W. Eckhardt and T.R. Moore, "Controls on Dissolved Organic Carbon Concentrations in Streams of Southern Quebec," *Canadian Journal of Fisheries and Aquatic Sciences* 47:1537–1544 (1990); J.-F. Koprivnjak and T.R. Moore,

"Sources, Sinks, and Fluxes of Dissolved Organic Carbon in Subarctic Fen Catchments," *Arctic and Alpine Research* 24:204–210 (1992); P. Kortelainen, "Content of Total Organic Carbon in Finnish Lakes and Its Relationship to Catchment Characteristics," *Canadian Journal of Fisheries and Aquatic Sciences* 50:1477–1483 (1993); T.A. Clair, *et al.*, "Exports of Carbon and Nitrogen from River Basins in Canada's Atlantic Provinces," *Global Biogeochemical Cycles* 8:441–450 (1994); D. Hope, *et al.*, "A Review of the Export of Carbon in River Water: Fluxes and Processes," *Environmental Pollution* 84:301–324 (1994); P.J. Dillon and L.A. Molot, "Effects of Landscape Form on Export of Dissolved Organic Carbon, Iron, and Phosphorus from Forested Stream Catchments," *Water Resources Research* 33:2591–2600 (1997); S.E. Gergel, *et al.*, "Dissolved Organic Carbon as an Indicator of the Scale of Watershed Influence on Lakes and Rivers," *Ecological Applications* 9:1377–1390 (1999)). Export of DOC to downstream waters supports primary productivity, effects pH and buffering capacity, and regulates exposure to UV–B radiation. *Id.* at 5–29 (citing K.N. Eshelman and H.F. Hemond, "The Role of Organic Acids in the Acid-base Status of Surface Waters at Bickford Watershed, Massachusetts," *Water Resources Research* 21:1503–1510 (1985); L.O. Hedin, *et al.*, "Patterns of Nutrient Loss from Unpolluted Old-growth Temperate Forests: Evaluation of Biogeochemical Theory," *Ecology* 76:493–509 (1995); D.W. Schindler and P.J. Curtis, "The Role of DOC in Protecting Freshwaters Subjected to Climate Warming and Acidification from UV Exposure," *Biogeochemistry* 36:1–8 (1997); J.C. Neff and G.P. Asner, "Dissolved Organic Carbon in Terrestrial Ecosystems: Synthesis and a Model," *Ecosystems* 4:29–48 (2001)).

Wetlands also act as sinks and transformers for pollutants, including excess nutrients, through such processes as denitrification, ammonia volatilization, microbial and plant biomass assimilation, sedimentation, sorption and precipitation, biological uptake, and long term storage of plant detritus. *Id.* (citing K.C. Ewel and H.T. Odum, *Cypress Swamps* (Gainesville, FL: University Presses of Florida, 1984); S.J. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals*, Technical Report Y 86–2 (Vicksburg, MS: U.S. Army Corps of Engineers, Waterways Experiment Station, 1986); C. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," *Critical Reviews in Environmental Control* 21:491–565 (1991); K.R. Reddy, *et al.*, "Phosphorus Retention in Streams and Wetlands: A Review," *Critical Reviews in Environmental Science and Technology* 29:83–146 (1999); W.J. Mitsch and J.G. Gosselink, *Wetlands*, 4th edition (Hoboken, NJ: John Wiley & Sons Inc., 2007); K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications* (Boca Raton, FL: CRC Press, 2008); R.H. Kadlec and S.D. Wallace, *Treatment Wetlands*, 2nd edition (Boca Raton, FL: CRC Press, 2009)). Specifically, wetlands reduce phosphorus, nitrate, and ammonium by large percentages. *Id.* at 5–30 (citing F.E. Dierberg and P.L. Brezonik, "Nitrogen and Phosphorus Mass Balances in a Cypress Dome Receiving Wastewater," *in* K.C. Ewel and H.T. Odum, ed., *Cypress Swamps* (Gainesville, FL: University Presses of Florida, 1984), pp. 112–118; E.J. Dunne, *et al.*, "Phosphorus Release and Retention by Soils of Natural Isolated Wetlands," *International Journal of Environment and Pollution* 28:496–516 (2006); T.E. Jordan, *et al.*, "Comparing Functional Assessments of Wetlands to Measurements of Soil Characteristics and Nitrogen Processing," *Wetlands* 27:479–497 (2007)). These processes are important for protecting downstream waters from pollutants from agricultural runoff. Wetland microbial processes reduce other pollutants, such as pesticides, hydrocarbons, heavy metals, and chlorinated solvents. *Id.* (citing R.R. Brooks, *et al.*, "Cobalt and Nickel Uptake by the *Nyssaceae*," *Taxon* 26:197–201 (1977); C.M. Kao, *et al.*, "Non-point Source Pesticide Removal by a Mountainous Wetland," *Water Science and Technology* 46:199–206 (2002); P.I. Boon, "Biogeochemistry and Bacterial Ecology of Hydrologically Dynamic Wetlands," *in* D. P. Batzer and R. R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176).

Tributary wetlands have important biological connections downstream that impact the integrity of (a)(1) through (a)(3) waters. Emergent and aquatic vegetation found in wetlands disperse by water, wind, and hitchhiking on migratory animals from tributary wetlands downstream. *Id.* at 5–31 (citing M.B. Soons and G.W. Heil, "Reduced Colonization Capacity in Fragmented Populations of Wind Dispersed Grassland Forbs," *Journal of Ecology* 90:1033–1043 (2002); M.B. Soons, "Wind Dispersal in Freshwater Wetlands: Knowledge for Conservation and Restoration," *Applied Vegetation Science* 9:271–278 (2006); C. Nilsson, *et al.*, "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010)). Similarly, fish move between the river network and wetlands during times of surface water connections, and tributary wetlands by definition are connected on the surface to downstream waters. *Id.* at 5–32 (citing J.W. Snodgrass, *et al.*, "Factors affecting the occurrence and structure of fish assemblages in isolated wetlands of the upper coastal plain, USA," *Canadian Journal of Fisheries and Aquatic Sciences* 53:443–454 (1996); K.D. Zimmer, *et al.*, "Effects of fathead minnow colonization and removal on a prairie wetland ecosystem," *Ecosystems* 4:346–357 (2001); M.J. Baber, *et al.*, "Controls on fish distribution and abundance in temporary wetlands," *Canadian Journal of Fisheries and Aquatic Sciences* 59:1441–1450 (2002); M.A. Hanson, *et al.*, "Biotic interactions as determinants of ecosystem structure in prairie wetlands: An example using fish," *Wetlands* 25:764–775 (2005); B.R. Herwig, *et al.*, "Factors influencing fish distributions in shallow lakes in prairie and prairie-parkland regions of Minnesota, USA," *Wetlands* 30:609–619 (2010)). Mammals that can disperse overland can also contribute to connectivity. *Id.* (citing C.E. Shanks, and G.C. Arthur, "Muskrat movements and population dynamics in Missouri farm ponds and streams," *Journal of Wildlife Management* 16:138–148 (1952); W.R. Clark, "Ecology of muskrats in prairie wetlands," *in* H.R. Murkin, *et al.*, ed., *Prairie Wetland Ecology: The Contribution of the Marsh Ecology Research Program*, (Ames, IA: Iowa State University Press, 2000), pp. 287–313). Insects also hitchhike on birds and mammals from tributary wetlands to the stream network, which can then serve as a food source for downstream waters. *Id.* (citing J. Figuerola, and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); J. Figuerola, *et al.*, "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates," *American Naturalist* 165:274–280 (2005)). Insects that are flight-capable also use both stream and tributary wetlands, moving from the stream to the wetland to find suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging, or breeding. *Id.* at 5–33 (citing D.D. Williams, "Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna," *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, "Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates," *Ecology Letters* 6:783–796 (2003)). Amphibians and reptiles, including frogs, toads, and newts, also move between streams or rivers and tributary wetlands to satisfy part of their life history requirements, feed on aquatic insects, and avoid predators. *Id.* (citing V.S. Lamoureux and D.M. Madison, "Overwintering Habitats of Radio Implanted Green Frogs, *Rana clamitans*," *Journal of Herpetology* 33:430–435 (1999); K.J. Babbitt, *et al.*, "Patterns of Larval Amphibian Distribution Along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology Revue Canadienne De Zoologie* 81:1539–1552 (2003); S.B. Adams, *et al.*, "Instream Movements by Boreal Toads (*Bufo boreas boreas*)," *Herpetological Review* 36:27–33 (2005); D.M. Green, "*Bufo americanus*, American Toad," *in* M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species* (Berkeley, CA: University of California Press, 2005), pp. 692–704; T.W. Hunsinger and M.J. Lannoo, "Notophthalmus viridescens, Eastern Newt," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species* (Berkeley, CA: University of California Press, 2005), pp. 912–914; J.W. Petranka, and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404–411 (2006); A.L. Subalusky, *et al.*, "Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity between Aquatic Systems," *Biological Conservation* 142:1507–1514 (2009)).

Lake, pond, and wetland tributaries, including wetlands that serve as stream origins, have important chemical, physical,

and biological connections downstream that affect (a)(1) through (a)(3) waters. Their direct hydrologic connection to the stream network facilitates the significant impact they have downstream. This impact on downstream waters occurs regardless of whether their flow is perennial, intermittent, or ephemeral. Thus, lake, pond, and wetland tributaries serve the same important functions as stream tributaries, which in turn greatly impact downstream (a)(1) through (a)(3) waters, particularly when their functional contributions to the chemical, physical, and biological conditions of downstream waters are combined at a watershed scale.

F. Man-Made or Man-Altered Tributaries Significantly Affect the Physical, Chemical and Biological Integrity of (a)(1) Through (a)(3) Waters

The agencies' proposed rule clarifies that man-made and man-altered tributaries as defined in the proposed rule are "waters of the United States" because the significant nexus between a tributary and a traditional navigable water or interstate water is not broken where the tributary flows through a culvert or other structure. Note that the proposal excludes certain ditches from CWA jurisdiction by rule in paragraphs (b)(3) and (b)(4). The scientific literature indicates that structures that convey water do not affect the connectivity between streams and downstream rivers. Indeed, because such structures can reduce water losses from evapotranspiration and seepage, such structures likely enhance the extent of connectivity by more completely conveying the water downstream.

Man made and man altered tributaries include impoundments, ditches, canals, channelized streams, piped, and the like. Ditches and canals are widespread across the United States. Ditches may have been streams that were channelized. They are purposely constructed to allow the hydrologic flow of the tributary to continue downstream. Man made and man altered tributaries, despite human manipulation, usually continue to have chemical, physical, or biological connections downstream and to serve important functions downstream. Because these tributaries are hydrologically connected to downstream waters, the chemical and some biological connections to downstream waters that are supported by this hydrologic connection are still intact. Often times man made tributaries create connections where they did not previously exist, such as canals that connect two rivers in different watersheds.

Tributary ditches and other man made or man altered waters that meet the definition of "tributary" have a significant nexus to (a)(1) through (a)(3) waters due to their impact, either individually or with other tributaries, on the chemical, physical, or biological integrity of those downstream waters. Tributary ditches and the like, as with other tributaries, have chemical, physical, and biological connections with downstream waters that substantially impact those waters. Tributary ditches and canals can have perennial, intermittent, or ephemeral flow. As described above, tributaries of all flow regimes have a significant nexus to downstream (a)(1) through (a)(3) waters. Due to the often straightened and channelized nature of ditches, these tributaries quickly move water downstream to (a)(1) through (a)(3) waters. Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. *See, e.g.,* J.P. Schmidt, *et al.,* "Nitrogen Export from Coastal Plain Field Ditches," *Journal of Soil and Water Conservation* 62(4):235–243; J.S. Strock, *et al.,* "Managing Natural Processes in Drainage Ditches for Nonpoint Source Nitrogen Control." *Journal of Soil and Water Conservation* 62(4): 188–196 (2007). Ditches provide habitat for fish and other aquatic organisms. *See, e.g.,* P.C. Smiley, Jr., *et al.,* "Contribution of Habitat and Water Quality to the Integrity of Fish Communities in Agricultural Drainage Ditches," *Journal of Soil and Water Conservation* 63(6):218A–219A (2008). Fish and other aquatic organisms utilize canals and ditches to move to different habitats, sometimes over long distances. F.J. Rahel, "Biogeographic Barriers, Connectivity and Homogenization of Freshwater Faunas: It's a Small World after All," *Freshwater Biology* 52(4): 696–710 (2007).

These significant connections and functions continue even where the tributary has a natural or man-made break in its channel, bed and banks, or OHWM. The presence of a channel, bed and banks, and OHWM upstream or downstream of the break is an indication that connections still exist. The significant nexus between a tributary and a downstream water is not broken where the tributary flows underground for a portion of its length, such as in karst topography. The hydrologic connection still exists, meaning that the chemical and biological connections that are mediated by the hydrologic connection also still exist. Similarly, flow through boulder fields does not sever the hydrologic connection. When a tributary flows through a wetland en route to another or the same tributary, the significant nexus still exists even though the bed and banks or ordinary high watermark is broken for the length of the wetland. As discussed in Part II, section I.C. of this appendix, in-stream wetlands provide numerous benefits downstream, and the presence of the wetland in stream can provide additional water quality benefits to the receiving waters. Flow in flat areas with very low gradients may temporarily break the tributary's bed and banks or OHWM, but these systems continue to have a significant nexus downstream. These are just illustrative examples of break in ordinary high watermark; there are several other types, all of which do not break the significant nexus between a tributary and the downstream (a)(1) through (a)(3) water.

There are more than 80,000 dams in the United States, with over 6,000 exceeding 15 meters in height. Report at 3–48 (citing U.S. Army Corps of Engineers, *National Inventory of Dams* (2009)). The purpose of a dam is to impound (store) water for any of several reasons (*e.g.* flood control, human water supply, irrigation, livestock water supply, energy generation, containment of mine tailings, recreation or pollution control). *See http://www.damsafety.org/layout/subsection.aspx?groupid=14&contentid=47.* Many dams fulfill a combination of the above functions. Because the purpose of a dam is to retain water effectively and safely, the water retention ability of a dam is of prime importance. Water may pass from the reservoir to the downstream side of a dam by: passing through the main spillway or outlet works; passing over an auxiliary spillway; overtopping the dam; seepage through the abutments; and seepage under the dam. *Id.* All water retention structures are subject to seepage through their foundations and abutments. Department of the Army, U.S. Army Corps of Engineers, *Engineering and Design—Design, Construction and Maintenance of Relief Wells,* EM 1110–2–1914 (Washington, DC: Department of the Army, 1992), p. 1–1. Thus waters behind a dam still maintain a hydrologic connection to downstream waters.

Numerous studies have shown that dams impede biotic movements, reducing biological connectivity between upstream and downstream locations. Report at 3–48 (citing E.A. Greathouse, *et al.,* "Indirect Upstream Effects Of Dams: Consequences Of Migratory Consumer Extirpation In Puerto Rico," *Ecological Applications* 16: 339–352 (2006); C.J. Hall, *et al.,* "The Historic Influence of Dams on Diadromous Fish Habitat with a Focus on River Herring and Hydrologic Longitudinal Connectivity," *Landscape Ecology* 26: 95–107(2011)). Dams alter but typically do not sever the hydrologic connection between upstream and downstream waters. (*See* Part II, section 2.C. of this appendix). Upstream of large dams riparian areas are permanently inundated, increasing hydrological connectivity. Downstream, peak flows and the potential for overbank lateral flow are reduced; however, dams may also reduce flow variability downstream, resulting in higher minimum flows and reduced flow intermittency and thereby increasing hydrological (and potentially biological) connectivity. *Id.* (citing N.L. Poff, *et al.,* "Homogenization of Regional River Dynamics by Dams and Global Biodiversity Implications," *Proceedings of the National Academy of Sciences of the United States of America* 104 5732–5737 (2007)). Where an impoundment does stop flow, it also has significant effects on downstream waters. For example, the downstream segments have a reduced quantity of waters, less sediment, and reduced species biological connectivity with upstream refugia.

Because dams reduce the amount of sediment delivered downstream, the reservoirs behind dams are actually very effective at retaining sediment, which can have significant effects in downstream waters. For instance, the Mississippi River's natural sediment load has been reduced by an estimated 50% through dam construction in the Mississippi Basin. M.D. Blum, and H. H. Roberts, "Drowning of the Mississippi Delta Due to Insufficient Sediment Supply and Global Sea-Level Rise," *Nature Geoscience* 2(7): 488–491 (2009).

Man-made or man-altered tributaries continue to have chemical, physical, and

biological connections that significantly affect the integrity of (a)(1) through (a)(3) waters. Though the man-made or man-altered nature of such tributaries can change the nature of the connections, it does not eliminate them. Thus, man-made and man-altered tributaries continue to serve the same important functions as "natural" tributaries, which in turn greatly impact downstream (a)(1) through (a)(3) waters, particularly when their functional contributions to the chemical, physical, and biological conditions of downstream waters are combined at a watershed scale.

ii. Adjacent Waters

Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. In addition, waters adjacent to tributaries serve many important functions that directly influence the integrity of downstream waters including traditional navigable waters, interstate waters, and the territorial seas. Adjacent waters store water, which can reduce flooding of downstream waters, and the loss of adjacent waters has been shown, in some circumstances, to increase downstream flooding. Adjacent waters maintain water quality and quantity, trap sediments, store and modify potential pollutants, and provide habitat for plants and animals, thereby sustaining the biological productivity of downstream rivers, lakes and estuaries, which may be traditional navigable waters, interstate waters, or the territorial seas. The scientific literature and Report supports these conclusions, as discussed in greater detail below.

1. Adjacent Waters Under This Proposed Rule Have a Significant Nexus to (a)(1) Through (a)(3) Waters

The discussion below summarizes the key points made in the Report and explains the technical basis for supporting a conclusion that adjacent waters, as defined in this proposed rule, have a significant nexus to waters identified in paragraphs (a)(1) through (a)(3) of the proposed rule. The geographic position of an "adjacent" water relative to the stream is indicative of the relationship they share, with many of its defining characteristics resulting from the movement of materials and energy between the two. A review and analysis of the scientific literature supports the conclusion that individually or in combination with similarly situated waters in a watershed, adjacent waters have a significant effect on the chemical, physical, and biological integrity of downstream traditionally navigable waters, interstate waters, and the territorial seas.

a. Riparian and Floodplain Waters Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Waters, including wetlands, often lie within landscape settings that have bidirectional hydrological exchange with (a)(1) through (a)(5) waters (e.g., wetlands and open waters in riparian areas and flood plains). Such waters play an integral role in the chemical, physical, and biological integrity of the waters to which they are adjacent. Riparian areas and floodplains often describe the same geographic region. Report at 3–4. Therefore, the discussion of the functions of waters, including wetlands, in riparian areas will typically apply to floodplains unless otherwise noted. Where connections arise specifically from the act of inundation of adjacent land during times of higher-than-normal water, the term "floodplain" is solely used to describe the area.

Riparian areas are transition zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and biota. *Id.*, Report at 31. Waters including wetlands in riparian areas significantly influence exchanges of energy and matter with aquatic ecosystems. See, *e.g.*, *id.* (citing National Research Council, *Riparian Areas: Functions and Strategies for Management* (Washington, DC: The National Academies Press, 2002).

Floodplains are low gradient areas bordering stream or river channels, lakes, and impoundments that were formed by sediment deposition from those waters under present climatic conditions. These natural geomorphic features are inundated during moderate to high water events. *Id.* (citing L.B. Leopold, *A View of the River* (Cambridge, MA: Harvard University Press, 1994); W.R. Osterkamp, *Annotated Definitions of Selected Geomorphic Terms and Related Terms of Hydrology, Sedimentology, Soil Science and Ecology*, USGS Open File Report 2008–1247 (Reston, VA: U.S. Department of the Interior, U.S. Geological Survey, 2008)). By "present climactic conditions," the agencies mean that currently or recently active floodplains will be used to help determine whether wetlands or waters are adjacent to "waters of the United States." The proposed definition is limited to the present climactic conditions in order to best represent the floodplain that has an active and significant relationship with the stream or river channel. Historic floodplains that played a role in the river or lake dynamics in the past only will not be used to determine whether a water is adjacent. Floodplains formed under different climactic conditions that no longer connect to the stream channel that formed them are terraces. *Id.* It should be noted that "floodplain" as defined in today's proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule. Flood insurance rate maps are based on the probability of a flood event occurring (e.g., 100-year floods have a 1% probability of occurring in a given year or 500 year-floods have a 0.2% probability of occurring in a particular year). Flood insurance rate maps are not based on an ecological definition of the term "floodplain," and therefore may not be appropriate for identifying adjacent wetlands and waters for the purposes of CWA jurisdiction. Flood insurance rate maps are developed by applying models and other information to identify areas that would be inundated by a flood event of a particular probability of recurring.

Riparian waters take many different forms. Some may be wetlands, which are defined in paragraph (c)(6) of the proposed rule. Others may be ponds, oxbow lakes, or other types of open waters. Oxbow lakes, commonly found in floodplains, are formed when river meanders are cutoff from the rest of the river. *Id.* at 5–42.

b. Riparian and Floodplain Waters Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters

Scientific research shows waters and wetlands in riparian areas and floodplains to be important in protecting the physical integrity of aquatic resources. Because riparian and floodplain waters exhibit bidirectional exchange of water with the waters to which they are adjacent, they play an important role in determining the volume and duration of stream flow. Riparian and floodplain waters also have an essential role in regulating and stabilizing sediment transport to downstream waters. These characteristics are fundamental to the physical integrity of streams as well as downstream traditional navigable waters, interstate waters, and the territorial seas.

Riparian and floodplain wetlands are important for the reduction or delay of floods. *Id.* at 3–22 (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). Waters in riparian areas control flooding during times of high precipitation or snowmelt by capturing water from overbank flow and storing excess stream water. *Id.* at 5–6. One study found that peak flows in the Cache River in Arkansas decreased by 10–20% mainly because of floodplain water storage. *Id.* (citing R. Walton, *et al.*, "Hydrology of the Black Swamp Wetlands on the Cache River, Arkansas," *Wetlands* 16:279–287 (1996). Research has shown that floodplain wetlands in Ohio store about 40% of the flow of small streams. *Id.* at 5–6 to 5–7 (citing D.E. Gamble, *et al., An Ecological and Functional Assessment of Urban Wetlands in Central Ohio. Columbus, Ohio*, EPA Technical Report WET/2007–3B, (Columbus, OH: Ohio Environmental Protection Agency, Wetland Ecology Group, Division of Surface Water, 2007)). These and similar findings point to the close hydrological influence that waters in riparian and floodplain areas have on streams.

Some adjacent waters are bordering or contiguous with (a)(1) through (a)(5) waters. Because of their close physical proximity to nearby water bodies, they readily exchange their waters through the saturated soils surrounding the stream or through surface exchange. This commingling of waters allows bordering or contiguous waters to both provide chemically transformed waters to streams and to absorb excess stream flow.

Flow between neighboring waters and streams is more longitudinal (downslope) at headwaters and more lateral further downstream. *Id.* at 5–38, Table 5–3. These connections in part determine stream flow volume and duration. Waters, including wetlands, in riparian areas connect to neighboring water bodies through various surface and subsurface connections. See, *e.g.*, *id.* at 3–4 (citing National Research Council,

Riparian Areas: Functions and Strategies for Management (Washington, DC: National Academy Press, 2002)). Floodplains, similarly, are closely associated with the groundwater found beneath and beside river channels (which are considered shallow aquifers) and waters in floodplains readily exchange water with such aquifers. *Id.* at 3–14 (citing J.A. Stanford and J. V. Ward, "An Ecosystem Perspective of Alluvial Rivers: Connectivity and the Hyporheic Corridor," *Journal of the North American Benthological Society* 12:48–60 (1993); C. Amoros and G. Bornette, "Connectivity and Biocompexity in Waterbodies of Riverine Floodplains," *Freshwater Biology* 47:761–776 (2002); G.C. Poole, *et al.*, "Multiscale Geomorphic Drivers of Groundwater Flow Paths: Subsurface Hydrologic Dynamics and Hyporheic Diversity," *Journal of the North American Benthological Society* 25:288–303 (2006)). Riparian and floodplain wetlands are frequently contiguous with streams and other water bodies and significantly influence the hydrology of such water bodies. *Id.* at 5–6 (citing R.J. Naiman, *et al., Riparia: Ecology, Conservation, and Management of Streamside Communities* (Burlington, MA: Elsevier Academic Press, 2005); P. Vidon, *et al.*, "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Floodplain wetlands are important for the reduction or delay of floods. *Id.* (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). Oxbow lakes also retain flood waters. *Id.* at 5–44. Adjacent ponds generally function similarly to oxbow lakes.

Waters in riparian areas filter sediment washed down from uplands and collect sediment from overbank flow as the river or stream floods. *Id.* at 5–7. For example, riparian areas were observed to collect 80 90% of the sediment from farmlands in a study in North Carolina. *Id.* (citing A. Cooper, *et al.*, "Riparian Areas as Filters for Agricultural Sediment," *Soil Science Society of America Proceedings* 51:416–420 (1987); R.B. Daniels and J.G. Gilliam, "Sediment and Chemical Load Reduction by Grass and Riparian Filters," *Soil Science Society of America Journal* 60:246–251 (1996); R.J. Naiman and H. Decamps, "The Ecology of Interfaces: Riparian Zones," *Annual Review of Ecology and Systematics* 28:621–658 (1997)). Maintaining the equilibrium between sediment deposition and sediment transport is important to maintain the physical shape and structure of stream channels. Significant changes to upstream channels can affect the chemical, physical, and biological condition of downstream (a)(1) through (a)(3) waters.

The physical effects of excess sediment can impair chemical and ecological integrity in a variety of ways. *Id.* at 5–9 (citing P.J. Wood and P.D. Armitage, "Biological Effects of Fine Sediment in the Lotic Environment," *Environmental Management* 21:203–217 (1997)). Excess sediment is linked to increasing contaminant and nutrient concentrations, all of which tributaries can transmit downstream, affecting water quality. Excess sediment may block and absorb sunlight transmission through the water column, inhibiting plant photosynthesis and warming the water in the stream. Sediment may fill the interstitial spaces between rocks in a streambed, which many fish and aquatic species use for mating, reproduction, and shelter from predators. This kind of physical degradation of tributary streambeds results in less suitable habitat available for animals and fish that move between upstream and downstream waters. Riparian waters that retain sediments thus protect downstream waters from the effects of excess sediment.

Oxbow lakes play similar roles in the floodplain as they are an integral part of alluvial floodplains of meandering rivers. *Id.* at 5–42 (citing K.O. Winemiller, *et al.*, "Fish Assemblage Structure in Relation to Environmental Variation among Brazos River Oxbow Lakes," *Transactions of the American Fisheries Society* 129:451–468 (2000), K. Glinska-Lewczuk, "Water Quality Dynamics of Oxbow Lakes in Young Glacial Landscape of NE Poland in Relation to Their Hydrological Connectivity," *Ecological Engineering* 35:25–37 (2009)). They connect to rivers by periodic overland flow, typically from the river during flooding events, and bidirectional shallow subsurface flow through fine river soils (bidirectional means flow from river to lake and lake to river). *Id.* at 5–43 to 5–44. Oxbow lakes generally have an important influence on the condition and function of rivers. *Id.* at 5–48 to 5–49. That influence can vary with the distance from the river and the age of the oxbow, reflecting the frequency and nature of the exchange of materials that takes place between the two water bodies.

Because adjacent waters support riparian vegetation, they affect the capacity of riparian vegetation to influence stream flow, morphology, and habitat provided in the nearby water body. Vegetation in riparian waters influences the amount of water in the stream by capturing and transpiring stream flow and intercepting groundwater and overland flow. *Id.* at 3–22, 5–7 (citing P. Meyboom, "Three Observations on Streamflow Depletion by Phreatophytes," *Journal of Hydrology* 2:248–261 (1964)). Riparian vegetation in adjacent waters also reduces stream bank erosion, serving to maintain the physical integrity of the channel. See, *e.g., id.* at 5–8 (citing C.E. Beeson and P. F. Doyle, "Comparison of Bank Erosion at Vegetated and Non-Vegetated Channel Bends," *Journal of the American Water Resources Association* 31:983–990 (1995)). In addition, inputs of woody debris from aquatic vegetation into waters make important contributions to the channel's geomorphology and the stream's aquatic habitat value. *Id.* (citing N.H. Anderson and J. R. Sedell, "Detritus Processing by Macroinvertebrates in Stream Ecosystems," *Annual Review of Entomology* 24:351–377 (1979); M.E. Harmon, *et al.*, "Ecology of Coarse Woody Debris in Temperature Ecosystems," *Advances in Ecological Research* 15:133–302 (1986); F. Nakamura and F. J. Swanson, "Effects of Coarse Woody Debris on Morphology and Sediment Storage of a Mountain Stream System in Western Oregon," *Earth Surface Processes and Landforms* 18:43–61 (1993); T.E. Abbe and D. R. Montgomery, "Large Woody Debris Jams, Channel Hydraulics and Habitat Formation in Large Rivers," *Regulated Rivers: Research & Management* 12:201–221 (1996); R.J. Naiman and H. Decamps, "The Ecology of Interfaces: Riparian Zones," *Annual Review of Ecology and Systematics* 28:621–658 91997); A.M. Gurnell, *et al.*, "Large Wood and Fluvial Processes," *Freshwater Biology* 47:601–619 (2002)). Also, the riparian vegetation that overhangs streams provides shade, providing a critically important function of reducing fluctuations in water temperature helping to reduce excessive algal production and to maintain life-supporting oxygen levels in streams and other waters. *Id.* at 5–9 (citing S.V. Gregory, *et al.*, "An Ecosystem Perspective of Riparian Zones: Focus on Links between Land and Water," *Bioscience* 41:540–551 (1991); E.C. Volkmar and R.A. Dahlgren, "Biological Oxygen Demand Dynamics in the Lower San Joaquin River, California," *Environmental Science & Technology* 40:5653–5660 (2006)). Even small changes in water temperature can have significant impacts on the type and number of species present in waters, with higher temperatures generally associated with degraded habitat which supports only those species that can tolerate higher temperatures and reduced levels of dissolved oxygen. Higher water temperatures are associated with streams and rivers with less valuable recreational and commercial fisheries. As discussed below, those physical characteristics of headwater streams influence what types of organisms live in the region.

Headwaters and nearby wetlands supply downstream waters with dissolved organic carbon as a result of decomposition processes from dead organic matter such as plants. The biological consequences of this dissolved organic carbon are discussed in more detail below. The presence of dissolved organic carbon can affect how light penetrates the water, an important factor in the growth of plants, algae, and other primary producers, and can protect aquatic organisms from the harmful effects of UV–B radiation. *Id.* at 5–28 to 5–29 (citing K.N. Eshelman and H.F. Hemond, "The role of organic acids in the acid-base status of surface waters at Bickford Watershed, Massachusetts," *Water Resources Research* 21:1503–1510 (1985); J.E. Hobbie and R.G. Wetzel, "Microbial control of dissolved organic carbon in lakes: Research for the future," *Hydrobiologia* 229:169–180 (1992); D.W. Schindler and P.J. Curtis, "The role of DOC in protecting freshwaters subjected to climate warming and acidification from UV exposure," *Biogeochemistry* 36:1–8 (1997); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications,* (Boca Raton, FL: CRC Press, 2008)).

c. Riparian and Floodplain Waters Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters

As stated above in the section on tributaries, pollutants such as petroleum waste products and other harmful pollutants dumped into any part of the tributary system are likely to flow downstream, or to be washed downstream, and thereby pollute traditional navigable waters, interstate

waters, and the territorial seas from which American citizens take their drinking water, shellfish, fin fish, water-based recreation, and many other uses. Some wetlands perform the valuable function of trapping or filtering out some pollutants (such as fertilizers, silt, and some pesticides), thereby reducing the likelihood that those pollutants will reach and pollute the tributaries of the downstream navigable or interstate waters (and eventually pollute those downstream waters themselves). However, many other pollutants (such as petroleum wastes and toxic chemical wastes), if dumped into wetlands or other waters that are adjacent to tributary streams, may reach those tributaries themselves, and thereafter flow downstream to pollute the nation's drinking water supply, fisheries, and recreation areas.

Riparian and floodplain waters play a critical role in controlling the chemicals that enter streams and other "waters of the United States" and as a result are vital in protecting the chemical, physical, and biological integrity of downstream (a)(1) through (a)(3) waters. Runoff (the water that has not evaporated or infiltrated into the groundwater) from uplands is a large source of pollution, but research has shown that wetlands and other riparian waters trap and chemically transform a substantial amount of the nutrients, pesticides, and other pollutants before they enter streams, river, lakes and other waters.

Chemicals and other pollutants enter waters from point sources, non-point sources, atmospheric deposition, upstream reaches, and through the hyporheic zone, a region beneath and alongside a stream bed where surface water and shallow groundwater mix. *Id.* at 5–10 (citing SW. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals,* Technical Report Y–86–2, (Vicksburg, MS: U.S. Army Corp of Engineers, Waterways Experiment Station, 1986); D.F. Whigham and T.E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003); S.L.Whitmire and S.K. Hamilton, "Rates of Anaerobic Microbial Metabolism in Wetlands of Divergent Hydrology on a Glacial Landscape," *Wetlands* 28:703–714 (2008)). Throughout the stream network, but especially in headwater streams and their adjacent wetlands, chemicals are sequestered, assimilated, transformed, or lost to the atmosphere by microbes, fungi, algae, and macrophytes present in riparian waters and soils. *Id.* (citing SW. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals,* Technical Report Y–86–2, (Vicksburg, MS: U.S. Army Corp of Engineers, Waterways Experiment Station, 1986); C. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," *Critical Reviews in Environmental Control* 21:491–565 (1991); P.I. Boon, "Biogeochemistry and Bacterial Ecology of Hydrologically Dynamic Wetlands," *in* D.P. Batzer and R.R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176; W.J. Mitsch and J.G. Gosselink, *Wetlands,* 4th edition, (Hoboken, NJ: John Wiley & Sons Inc., 2007); K.R., Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications* (Boca Raton, FL: CRC Press, 2008). These chemical processes reduce or eliminate pollution that would otherwise enter streams, rivers, lakes and other waters and subsequently downstream traditional navigable waters, interstate waters, or the territorial seas. The removal of the nutrients nitrogen and phosphorus is a particularly important role for riparian waters. Nutrients are necessary to support aquatic life, but the presence of excess nutrients can lead to eutrophication and the depletion of oxygen nearby waters and in waters far downstream. See, *e.g., id.* at 1–8. Eutrophication is a large problem in waters across the United States including such significant ecosystems as the Chesapeake Bay and Lake Spokane in Washington. W.M. Kemp, *et al.,* "Eutrophication of Chesapeake Bay: Historical Trends and Ecological Interactions," *Marine Ecology Progress Series* 303(21):1–29 (2005); D.J. Moore and J. Ross, *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load: Water Quality Improvement Report,* Publication No. 07–10–073 (Spokane, WA: Washington State Department of Ecology, 2010); R.R. Murphy, *et al.,* "Long-Term Trends in Chesapeake Bay Seasonal Hypoxia, Stratification, and Nutrient Loading," *Estuaries and Coasts* 34(6):1293–1309 (2011). Eutrophication is the process by which plants and algae grow in waters to such an extent that the abundance of vegetation monopolizes the available oxygen, detrimentally affecting other aquatic organisms. *Id.* Oxbow lakes also have high mineralization rates, suggesting that similar to adjacent wetlands they process and trap nutrients from runoff. Report at 5–45 to 5–46 (citing K.O. Winemiller, *et al.,* "Fish Assemblage Structure in Relation to Environmental Variation among Brazos River Oxbow Lakes," *Transactions of the American Fisheries Society* 129:451–468 (2000)). Protection of these waters therefore helps maintain the chemical integrity of the nation's waters.

The removal of nitrogen is an important function of all waters, including wetlands, in the riparian areas. Riparian areas regularly remove more than half of dissolved nitrogen found in surface and subsurface water by plant uptake and microbial transformation. *Id.* at 5–11 (citing P. Vidon, *et al.,* "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Denitrification in surface and subsurface flows is highest where there is high organic matter and/or anoxic conditions. *Id.* Denitrification occurs in wetland soils where there is high organic matter, low oxygen, denitrifying microbes, and saturated soil conditions, and rates increase with proximity to streams. *Id.* (citing S.V. Gregory, *et al.,* "An Ecosystem Perspective of Riparian Zones: Focus on Links between Land and Water," *Bioscience* 41:540–551 (1991); P. Vidon, *et al.,* "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Riparian waters are therefore important in maintaining the conditions important for denitrification, which in turn protects streams, rivers, lakes and other waters from nitrogen pollution.

Plant uptake of dissolved nitrogen in subsurface flows also accounts for large quantities of nitrogen removal. Riparian forests have been found to remove 75% of dissolved nitrate transported from agricultural fields in Maryland. *Id.* (citing P. Vidon, *et al.,* "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Likewise, riparian forests in Georgia remove 65% of nitrogen and 30% of phosphorus from agricultural sources. *Id.* at 5–11 to 5–12 (citing Vidon, *et al.* 2010). A Pennsylvania forest removed 26% of the nitrate from the subsurface. *Id.* at 5–12 (citing J.D. Newbold, *et al.,* "Water Quality Functions of a 15-Year-Old Riparian Forest Buffer System," *Journal of the American Water Resources Association* 46:299–310 (2010)). The vegetation associated with riparian waters also removes nitrogen from subsurface flows. Therefore, the conservation of riparian waters helps protect downstream waters from influxes of dissolved nitrogen.

Phosphorus is another potentially harmful nutrient that is captured and processed in riparian waters. *Id.* (citing T.A. Dillaha and S.P. Inamdar, "Buffer Zones as Sediment Traps or Sources," *in* N.E. Haycock, T.P. Burt, K.W.T. Goulding, and G. Pinay, ed., *Buffer Zones: Their Processess and Potential in Water Protection,* Proceedings of the International Conference on Buffer Zones, September 1996 (Hertfordshire, UK: Quest Environmental, 1997), pp. 33–42; A.N. Sharpley and S. Rekolainen, "Phosphorus in Agriculture and Its Environmental Implications," *in* H. Tunney, *et al.,* ed., *Phosphorus Losses from Soil to Water* (Cambridge, UK: CAB International, 1997), pp. 1–54; G.C. Carlyle and A.R. Hill, "Groundwater Phosphate Dynamics in a River Riparian Zone: Effects of Hydrologic Flowpaths, Lithology, and Redox Chemistry," *Journal of Hydrology* 247:151–168 (2001)). Biogeochemical processes, sedimentation, and plant uptake account for high rates of removal of particulate phosphorus in riparian areas. *Id.* (citing C.C. Hoffmann, *et al.,* "Phosphorus Retention in Riparian Buffers: Review of Their Efficiency," *Journal of Environmental Quality* 38:1942–1955 (2009)). The amount of contact the water has with nearby soils determines the ability of the riparian area to remove phosphorus. *Id.* This function of upstream riparian waters is crucial for maintaining the chemical and biological integrity of the waters to which they are adjacent, and for preventing eutrophication in downstream traditional navigable waters, interstate waters, and the territorial seas.

d. Riparian and Floodplain Waters Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters

Waters and wetlands located in both riparian areas and floodplains support the biological integrity of downstream (a)(1) through (a)(3) waters in a variety of ways. They provide habitat for aquatic and water-tolerant plants, invertebrates, and vertebrates, and provide feeding, refuge, and breeding areas for invertebrates and fish. Seeds, plants, and animals move between waters in the riparian zone and floodplains and the adjacent streams, and from there colonize or utilize downstream waters, including traditional navigable waters.

Organic matter from adjacent wetlands is critical to aquatic food webs, particularly in headwaters, where it is the primary source of energy flow due to low light conditions that inhibit photosynthesis. *Id.* at 5–13 (citing J.L. Tank, *et al.*, "A Review of Allochthonous Organic Matter Dynamics and Metabolism in Streams," *Journal of the North American Benthological Society* 29:118–146 (2010)). Headwater streams tend to be located in heavily vegetated areas compared to larger waters, so they are more likely to contain leaf litter, dead and decaying plants, and other organic matter that forms the basis of headwater food webs. The organic matter is processed by microbes and insects that make the energy available to higher levels of stream life such as amphibians and fish. Studies have shown that macroinvertebrates rely on leaf inputs in headwater streams and that excluding organic litter from a stream resulted in significant changes to the food web at multiple levels. *Id.* (citing G.W. Minshall, "Role of Allochthonous Detritus in the Tropic Structure of a Woodland Springbrook Community," *Ecology* 48:139–149 (1967); J.B. Wallace, *et al.*, "Multiple Trophic Levels of a Forest Stream Linked to Terrestrial Litter Inputs," *Science* 277:102–104 (1997); J.L. Meyer, *et al.*, "Leaf Litter as a Source of Dissolved Organic Carbon in Streams," *Ecosystems* 1:240–249 (1998)). Fish and amphibian species found in headwaters travel downstream and in turn become part of the food web for larger aquatic organisms in rivers and other waters. Organic material provided by riparian waters to small, headwater streams is therefore important not only to the small streams that directly utilize this source of energy to support their biological populations but also to the overall biological integrity of downstream waters that also benefit from the movement of fish and other species that contribute to the food web of larger streams and rivers.

Floodplain water bodies, including oxbow lakes, accumulate organic carbon, an important function influenced by the size and frequency of floods from adjacent rivers. *See, e.g., id.* at 5–45 (citing A. Cabezas, *et al.*, "Changing Patterns of Organic Carbon and Nitrogen Accretion on the Middle Ebro Floodplain (NE Spain)," *Ecological Engineering* 35:1547–1558 (2009)). These stored chemicals are available for exchange with river water when hydrological connections form. Organic materials are the basis for the food web in stream reaches where photosynthetic production of energy is absent or limited, particularly in headwater systems where vegetative litter alone makes up the base of the aquatic food web. The maintenance of floodplain waters is therefore an important component of protecting the biological integrity of downstream waters into which the headwaters flow.

The waters, including wetlands, in the riparian area play an important role in the removal of pesticides. *Id.* at 5–14 (citing P. Vidon, *et al.*, "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010). Microbes near plant roots break down these pesticides. *See, e.g., id.* (citing G. Voos, and P.M. Groffman, "Relationships between microbial biomass and dissipation of 2,4–D and dicamba in soil," *Biology and Fertility of Soils* 24:106–110 (1996)). Uptake by aquatic plants has also been shown to be an important mechanism of removal of the pesticides alachlor and atrazine. *Id.* (citing K.G. Paterson and J.L. Schnoor, "Fate of Alachlor and Atrazine in a Riparian Zone Field Site," *Water Environment Research* 64:274–283 (1992)). Riparian waters also trap and hold pesticide contaminated runoff preventing it from harming neighboring waters.

Riparian areas are dynamic places that support a diversity of aquatic, amphibious, and terrestrial species adapted to the unique habitat created by periodic flooding events. *Id.* at 5–15 (citing W.J. Junk, *et al.*, "The flood pulse concept in river-floodplain systems," *in* D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; K. Tockner, *et al.*, "An Extension of the Flood Pulse Concept," *Hydrological Processes* 14:2861–2883 (2000); C.T. Robinson, *et al.*, "The Fauna of Dynamic Riverine Landscapes," *Freshwater Biology* 47:661–677 (2002)). Plants, invertebrates, and vertebrates use waters, including wetlands, in the riparian areas for habitat, nutrients, and breeding. As a result, the waters, including wetlands, in the riparian areas act as sources of organisms, particularly during inundation events, replenishing neighboring waters with organisms, seeds, and organic matter. Inundation and hydrological connectivity of riparian areas greatly increase the area of aquatic habitats and species diversity. *Id.* at 5–15 to 5–16 (citing W.J. Junk *et al.* 1989; R. Jansson, *et al.*, "Hydrochory Increases Riparian Plant Species Richness: A Comparison between a Free-Flowing and a Regulated River," *Journal of Ecology* 93:1094–1103 (2005)). Aquatic animals, including amphibians and fish, take advantage of the waters present in riparian areas, either inhabiting them or moving between the riparian water and neighboring waters. *Id.* at 5–15, 5–17, 5–19 (citing G.H. Copp, "The habitat diversity and fish reproductive function of floodplain ecosystems," *Environmental Biology of Fishes* 26:1–27 (1989); L.A. Smock, *et al.*, "Lotic macroinvertebrate production in three dimensions: Channel surface, hyporheic, and floodplain environments," *Ecology* 73:876–886 (1992); L.A. Smock, "Movements of invertebrates between stream channels and forested floodplains," *Journal of the North American Benthological Society* 13:524–531 (1994); C. T. Robinson, *et al.*, "The fauna of dynamic riverine landscapes," *Freshwater Biology* 47:661–677 (2002); J.S. Richardson, *et al.*, "Riparian communities associated with Pacific Northwest headwater streams: Assemblages, processes, and uniqueness," *Journal of the American Water Resources Association* 41:935–947 (2005); C. Ilg, *et al.*, "Long-term reactions of plants and macroinvertebrates to extreme floods in floodplain grasslands," *Ecology* 89:2392–2398 (2008); D.E. Shoup, and D. H. Wahl, "Fish diversity and abundance in relation to interannual and lakespecific variation in abiotic characteristics of floodplain lakes of the lower Kaskaskia River, Illinois," *Transactions of the American Fisheries Society* 138:1076–1092 (2009)). Likewise, seeds, plant fragments, and whole plants move between riparian and floodplain waters and the river network. *Id.* at 5–15 (citing R.L. Schneider, and R.R. Sharitz, "Hydrochory and regeneration in a bald cypress water tupelo swamp forest," *Ecology* 69:1055–1063 (1988); B. Middleton, "Hydrochory, seed banks, and regeneration dynamics along the landscape boundaries of a forested wetland," *Plant Ecology* 146:169–184 (2000); C. Nilsson, *et al.*, "The role of hydrochory in structuring riparian and wetland vegetation," *Biological Reviews* 85:837–858 (2010)).

Hydrological connections are often drivers of biological connections, and flooding events enhance the existing connections between floodplain waters and the river network. As a result, waters within floodplains have important functions for aquatic health. Many species have cycles timed to flooding events, particularly in circumstances where flooding is associated with annual spring snowmelt or high precipitation. *Id.* at 5–15 to 5–17, 5–20 (citing J.R. Thomas, *et al.*, "A landscape perspective of the stream corridor invasion and habitat characteristics of an exotic (Dioscorea oppositifolia) in a pristine watershed in Illinois," *Biological Invasions* 8:1103–1113 (2006); L.M. Tronstad, *et al.*, "Aerial colonization and growth: Rapid invertebrate responses to temporary aquatic habitats in a river floodplain," *Journal of the North American Benthological Society* 26:460–471 (2007); A. Gurnell, *et al.*, "Propagule deposition along river margins: Linking hydrology and ecology," *Journal of Ecology* 96:553–565 (2008)). Waters within floodplains act as sinks of seeds, plant fragments, and invertebrate eggs, allowing for cross-breeding and resulting gene flow across time. *Id.* at 5–19 to 5–21 (citing K.M. Jenkins, and A.J. Boulton, "Connectivity in a dryland river: Short-term aquatic microinvertebrate recruitment following floodplain inundation," *Ecology* 84:2708–2723 (2003); D. Frisch, and S.T. Threlkeld, "Flood-mediated dispersal versus hatching: Early recolonisation strategies of copepods in floodplain ponds," *Freshwater Biology* 50:323–330 (2005); B. Vanschoenwinkel, *et al.*, "Wind mediated dispersal of freshwater invertebrates in a rock pool metacommunity: Differences in dispersal capacities and modes," *Hydrobiologia* 635:363–372 (2009)).

Micro- and macroinvertebrates colonize nutrient rich waters within floodplains during periods of inundation, facilitating an increase in population and sustaining them though times of limited resources and population decline. *Id.* at 5–19 (citing W.J. Junk, *et al.*, "The flood pulse concept in river-floodplain systems," *in* D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; B. Malmqvist, "Aquatic invertebrates in riverine landscapes," *Freshwater Biology* 47:679–694 (2002); C. Ilg, *et al.*, "Long-term reactions of plants and macroinvertebrates to extreme floods in floodplain grasslands," *Ecology* 89:2392–2398 (2008)). Such animals are adapted to high floods, desiccation (drying out), or other stresses that come with these regular, systemic fluctuations. *Id.* at 5–20 (citing Jenkins and Boulton 2003). Floodplain waters therefore maintain various biological populations, which periodically replenish adjacent jurisdictional waters, serving to maintain their biological integrity.

Plants and animals use waters, including wetlands, in the riparian areas and floodplains for habitat, food, and breeding. Oxbow lakes in the floodplain provide critical fish habitat needed for feeding and rearing, leading researchers to conclude that the entire floodplain should be considered a single functional unit, essential to the river's biological integrity. *Id.* at 5–17 (citing D.E. Shoup and D.H. Wahl, "Fish Diversity and Abundance in Relation to Interannual and Lake-Specific Variation in Abiotic Characteristics of Floodplain Lakes of the Lower Kaskaskia River, Illinois," *Transactions of the American Fisheries Society* 138:1076–1092 (2009)). Since adjacent ponds are structurally and biologically similar to oxbow lakes they serve similar functions relative to the nearby river or stream. Waters, including wetlands, in the riparian areas also provide food sources for stream invertebrates, which colonize during inundation events. *Id.* at 5–19 (citing W.J. Junk, *et al.*, "The Flood Pulse Concept in River-Floodplain Systems," *in* D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; C. Ilg, *et al.*, "Long-term Reactions of Plants and Macroinvertebrates to Extreme Floods in Floodplain Grasslands," *Ecology* 89:2392–2398 (2008)). Riparian waters also form an integral part of the food web, linking primary producers and plants to higher animals. *Id.* (citing B. Malmqvist, "Aquatic Invertebrates in Riverine Landscapes," *Freshwater Biology* 47:679–694 (2002); G.U.Y. Woodward and A.G. Hildrew, "Food Web Structure in Riverine Landscapes," *Freshwater Biology* 47:777–798 (2002), T.K. Stead, *et al.*, "Secondary Production of a Stream Metazoan Community: Does the Meiofauna Make a Difference?," *Limnology and Oceanography* 50:398–403 (2005), D.J. Woodford and A.R. McIntosh, "Evidence of Source-Sink Metapopulations in a Vulnerable Native Galaxiid Fish Driven by Introduced Trout," *Ecological Applications* 20:967–977 (2010)). Likewise, floodplains are important foraging, hunting, and breeding sites for fish and amphibians. *Id.* at 5–15 (citing G.H. Copp, "The Habitat Diversity and Fish Reproductive Function of Floodplain Ecosystems," *Environmental Biology of Fishes* 26:1–27 (1989); J.S. Richardson, *et al.*, "Riparian Communities Associated with Pacific Northwest Headwater Streams: Assemblages, Processes, and Uniqueness," *Journal of the American Water Resources Association* 41:935–947 (2005)).

Plants and animals move back and forth between riparian or floodplain waters and the river network. This movement is assisted in some cases when flooding events create hydrological connections. For instance, these floodplain and riparian wetlands provide refuge, feeding, and rearing habitat for many fish species. *Id.* at 5–17 (citing C.H. Wharton, *et al., The Ecology of Bottomland Hardwood Swamps of the Southeast: A Community Profile,* FWS/OBS–81/37 (Washington, DC: U.S. Department of the Interior, Fish and Wildlife Service, Biological Services Program, 1982); M.P. Matheney and C.F. Rabeni, "Patterns of Movement and Habitat Use by Northern Hogsuckers in an Ozark Stream," *Transactions of the American Fisheries Society* 124:886–897 (1995); A.A. Pease, *et al.*, "Habitat and Resource Use by Larval and Juvenile Fishes in an Arid-Land River (Rio Grande, New Mexico)," *Freshwater Biology* 51:475–486 (2006); J.A. Henning, *et al.*, "Use of Seasonal Freshwater Wetlands by Fishes in a Temperate River Floodplain," *Journal of Fish Biology* 71:476–492 (2007); C.A. Jeffres, *et al.*, "Ephemeral Floodplain Habitats Provide Best Growth Conditions for Juvenile Chinook Salmon in a California River," *Environmental Biology of Fishes* 83:449–458 (2008)). Seeds ingested by animals such as carp are dispersed in stream channels and associated waters. See, *e.g., id.* at 5–16 (citing B.J.A. Pollux, *et al.*, "Consequences of Intraspecific Seed-Size Variation in *Sparganium emersum* for Dispersal by Fish," *Functional Ecology* 21:1084–1091 (2007)). Also, phytoplankton move between floodplain wetlands and the river network. *Id.* at 5–17 (citing D.G. Angeler, *et al.*, "Phytoplankton community similarity in a semiarid floodplain under contrasting hydrological connectivity regimes," *Ecological Research* 25:513–520 (2010)). In turn, the primary productivity conditions in the floodplain results in large populations of phytoplankton that enrich river networks when hydrological connections form. *Id.* (citing P.W. Lehman, *et al.*, "The Influence of Floodplain Habitat on the Quantity and Quality of Riverine Phytoplankton Carbon Produced During the Flood Season in San Francisco Estuary," *Aquatic Ecology* 42:363–378 (2008)). This influx of carbon into the river system nourishes the downstream waters, for example, supporting fisheries.

However, even when hydrological connections are absent, some organisms can move between riparian waters and their neighboring tributaries by overland movement in order to complete their life cycle. River-dwelling mammals, such as river otters, move from the river to riparian wetlands. *Id.* at 5–18 (citing D.G. Newman and C.R. Griffin, "Wetland Use by River Otters in Massachusetts," *Journal of Wildlife Management* 58:18–23 (1994)). Several species of amphibians and reptiles including frogs, snakes and turtles use both streams and neighboring waters. *Id.* at 1–10, 5–4 to 5–5 (Table 5–1), 5–15 (citing J.S. Richardson, *et al.*, "Riparian Communities Associated with Pacific Northwest Headwater Streams: Assemblages, Processes, and Uniqueness," *Journal of the American Water Resources Association* 41:935–947 (2005)). Movement between wetlands and the river network also occurs by the dispersal of seed and plant fragments and the wind dispersal of invertebrates. *Id.* at 5–15, 5–20 (citing R.L. Schneider and R.R. Sharitz, "Hydrochory and Regeneration in a Bald Cypress Water Tupelo Swamp Forest," *Ecology* 69:1055–1063 (1988); B. Middleton, "Hydrochory, Seed Banks, and Regeneration Dynamics Along the Landscape Boundaries of a Forested Wetland," *Plant Ecology* 146:169–184 (2000); A.M. Gurnell, "Analogies Between Mineral Sediment and Vegetative Particle Dynamics in Fluvial Systems," *Geomorphology* 89:9–22 (2007); A. Gurnell, *et al.*, "Propagule Deposition Along River Margins: Linking Hydrology and Ecology," *Journal of Ecology* 96:553–565 (2008); C. Nilsson, *et al.*, "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010); L.M. Tronstad, *et al.*, "Aerial Colonization and Growth: Rapid Invertebrate Responses to Temporary Aquatic Habitats in a River Floodplain," *Journal of the North American Benthological Society* 26:460–471 (2007)). Animals, particularly migratory fish, may thus move between adjacent waters and (a)(1) through (a)(3) waters. And even when some species do not traverse the entire distance from adjacent waters to downstream waters, the downstream waters still benefit from the ecological integrity that persists because of the close relationship that adjacent waters have with nearby waters. This is because the chemical and biological properties that arise from interactions between adjacent waters and tributaries move downstream and support the integrity of (a)(1) through (a)(3) waters.

Biological connections between adjacent waters and river systems do not always increase with hydrologic connections. In some cases, the lack of connection improves the biological contribution provided by riparian waters towards neighboring streams, rivers, and lakes. For instance, the periodic hydrologic disconnectedness of oxbow lakes is necessary for the accumulation of plankton, an important source of carbon more easily assimilated by the aquatic food chain than terrestrial forms of carbon. *Id.* at 5–46 (citing C. Baranyi, *et al.*, "Zooplankton Biomass and Community Structure in a Danube River Floodplain System: Effects of Hydrology," *Freshwater Biology* 47:473–482 (2002); S. Keckeis, *et al.*, "The Significance of Zooplankton Grazing in a Floodplain System of the River Danube," *Journal of Plankton Research* 25:243–253 (2003)). Similarly, some degree of hydrological disconnectedness is important in increasing the number of mollusk species and macroinvertebrate diversity in oxbow lakes, which in turn support the diversity of

mollusks throughout the aquatic system. *Id.* at 5–46 to 5–47 (citing W. Reckendorfer, *et al.*, "Floodplain Restoration by Reinforcing Hydrological Connectivity: Expected Effects on Aquatic Mollusc Communities," *Journal of Applied Ecology* 43:474–484 (2006); K. Obolewski, *et al.*, "Effect of Hydrological Connectivity on the Molluscan Community Structure in Oxbow Lakes of the Lyna River," *Oceanological and Hydrobiological Studies* 38:75–88 (2009).

2. Confined Surface and Shallow Subsurface Hydrologic Connections Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Wetlands and open waters, including those outside the riparian zone and floodplain, can be connected downstream through unidirectional flow from the wetland or open water to a nearby tributary. Such connections can occur through a confined surface or a shallow subsurface hydrologic connection. Report at 3–7, 5–23. Outside of the riparian zone and floodplain, surface hydrologic connections between adjacent waters and jurisdictional waters can occur via confined flows (e.g. a swale, gully, ditch, or other discrete feature). For purposes of this rule, confined surface connections are defined as permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches. In some cases, these connections will be a result of "fill and spill" hydrology. A directional flowpath is a path where water flows repeatedly from the wetland or open water to the nearby jurisdictional water that at times contains water originating in the wetland or open water as opposed to just directly from precipitation. For the purposes of this rule, "fill and spill" describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. *Id.* at 5–62 (citing T.C. Winter and D.O Rosenberry, "Hydrology of Prairie Pothole Wetlands during Drought and Deluge: A 17 year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records," *Climatic Change* 40:189–209 (1998); S.G. Leibowitz, and K.C. Vining, "Temporal connectivity in a prairie pothole complex," *Wetlands* 23:13–25 (2003)). Water connected through such flows originate from the adjacent wetland or open water, travel to the downstream jurisdictional water, and are connected to those downstream waters by swales or other directional flowpaths on the surface.

A confined surface hydrologic connection, which may be perennial, intermittent or ephemeral, supports periodic flows between the adjacent water and the jurisdictional water. For example, wetland seeps are likely to have perennial connections to streams that provide important sources of baseflow, particularly during summer. *Id.* at 5–22 (citing T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA catchment," *Journal of the American Water Resources Association* 47:337–349 (2011)). Other wetlands are connected to streams via intermittent or ephemeral conveyances and can contribute flow to downstream waters via their surface hydrologic connection. *Id.* at 5–22 (citing M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008); B.P. Wilcox, *et al.*, "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31:451–458 (2011)).The surface hydrologic connection of the neighboring water to the jurisdictional water and the close proximity of the waters enhance the neighboring waters substantial effects the waters have on downstream (a)(1) through (a)(3) waters. Wetlands and open waters that are connected to (a)(1) through (a)(5) waters through a confined surface hydrologic connection will have an impact on downstream (a)(1) through (a)(3) waters, regardless of whether the outflow is permanent, intermittent, or ephemeral. *See, e.g., id.* at 5–1 to 5–2.

Wetlands and open waters with confined surface connections can affect the physical integrity of waters to which they connect. Such waters can provide an important source of baseflow to the streams to which they are adjacent, helping to sustain the water levels in the nearby streams. *Id.* at 5–22 (citing T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA catchment," *Journal of the American Water Resources Association* 47:337–349 (2011); M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008); B.P. Wilcox, *et al.*, "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31:451–458 (2011)) and T.M. Lee, *et al.*, *Effect of Groundwater Levels and Headwater Wetlands on Streamflow in the Charlie Creek Basin, Peace River Watershed, West Central Florida*, U.S. Geological Survey Scientific Investigations Report 2010–5189 (Reston, Virginia: U.S. Department of the Interior, U.S Geological Survey, 2010). Waters with a confined surface connection to downstream jurisdictional waters can affect streamflow by altering baseflow or stormflow through several mechanisms, including surface storage and groundwater recharge. Report at 5–25. Wetlands effectively store water because the entire aboveground portion of the wetland basin is available for water storage, in contrast to upland areas where soil particles or rock reduce water storage volume for a given volume of that soil or rock (i.e., the specific yield). *Id.* at 5–25 (citing A.I. Johnson, *Specific Yield—Compilation of Specific Yields for Various Materials*, USGS Water Supply Paper 1662–D (Washington, DC: U.S. Department of the Interior, U.S. Geological Survey, 1967)). By storing water, these waters can reduce peak streamflow, and thus, downstream flooding. *Id.* at 5–25 (citing A. Bullock, and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003); P. McEachern, *et al.*, "Landscape Control of Water Chemistry in Northern Boreal Streams of Alberta," *Journal of Hydrology* 323:303–324 (2006)). Antecedent moisture conditions, available wetland storage, and evaporation rates could impact water storage, as some waters connected to jurisdictional waters via discrete features may actually reduce flows in the streams they neighbor during dry periods. *Id.* at 5–26 (citing A. Bullock, and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," Hydrology and Earth System Sciences 7:358–389 (2003)). Thus, wetlands and open waters with a confined hydrologic connection to jurisdictional waters may function as a sink in dry periods if storage capacity is not exceeded and evaporation rates surpass groundwater recharge. *Id.* at 5–26 to 5–27.

Wetlands and open waters with confined surface connections can affect the chemical integrity of waters to which they connect. Such waters can affect water quality of jurisdictional waters through source and sink functions, often mediated by transformation of chemical constituents. The surface hydrologic connections to nearby jurisdictional waters provide pathways for materials transformed in the wetlands and open waters (such as methylmercury or degraded organic matter) to reach and affect the nearby waters and the downstream (a)(1) through (a)(3). *Id.* at 5–27. Functions that occur in the wetlands and open waters can affect downstream (a)(1) through (a)(3) waters when compounds that are transformed in wetland environments move to downstream waters via the surface hydrologic connection. *Id.* at 5–28 (citing T.C. Winter and J.W Labaugh, "Hydrologic Considerations in Defining Isolated Wetlands," Wetlands 23:532–540 (2003)). For example, methylmercury (which can form in peatlands) can be transported through entrainment with organic matter exports, and can move through surface flows from peatlands with confined surface connections to downstream waters. *Id.* at 5–28 (citing O Lindqvist, *et al.*, "Mercury in the Swedish Environment—Recent Research on Causes, Consequences, and Remedial Measures," *Water Air and Soil Pollution* 55:xi–xiii (1991); G. Mierle, and R. Ingram, "The Role of Humic Substances in the Mobilization of Mercury from Watersheds," *Water Air and Soil Pollution* 56:349–357 (1991); V.L. St. Louis, *et al.*, "Importance of Wetlands as Sources of Methyl mercury to Boreal Forest Ecosystems," *Canadian Journal of Fisheries and Aquatic Sciences* 51:1065–1076 (1994); C.T. Driscoll, *et al.*, "The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes," *Water Air and Soil Pollution* 80:499–508 (1995); P. Porvari, and M. Verta, "Total and Methyl mercury Concentrations and Fluxes from Small Boreal Forest Catchments in Finland," *Environmental Pollution* 123:181–191 (2003)). The mercury that is transported downstream can enter the food chains of the

(a)(1) through (a)(3) waters and negatively impact wildlife inhibiting those downstream waters. *Id.* at 5–28. Export of dissolved organic matter from neighboring waters connected via a confined surface connection can have potentially negative effects on downstream waters because contaminants, such as MeHg and other trace metals, can be adsorbed to the organic matter. *Id.* at 5–28 (citing E.M. Thurman, *Organic Geochemistry of Natural Waters* (Boston, MA: Martinus Nijhoff/Dr. W. Junk Publishers, 1985); C.T. Driscoll, *et al.*, "The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes," *Water Air and Soil Pollution* 80:499–508 (1995)). Dissolved organic matter, however, is also an important source of energy for downstream aquatic communities. *Id.* at 5–28 (citing J.E. Hobbie and R.G. Wetzel, "Microbial control of dissolved organic carbon in lakes: Research for the future," *Hydrobiologia* 229:169–180 (1992); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Wetlands with confined surface hydrologic connections to the stream are connected to jurisdictional tributary system and therefore can efficiently transport dissolved organic carbon and other dissolved organic matter to the nearby jurisdictional water and downstream (a)(1) through (a)(3) waters. *See, e.g.*, I.F. Creed, *et al.*, "Cryptic Wetlands: Integrating Hidden Wetlands in Regression Models of the Export of Dissolved Organic Carbon from Forested Landscapes," *Hydrological Processes* 17:3629–3648 (2003). Adjacent waters with a surface hydrologic connection to jurisdictional waters can also improve water quality through assimilation, transformation, or sequestration of nutrients and other pollutants. Report at 5–29 (citing, *e.g.*, K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). These processes can occur during times of lower hydroperiods when water is not present in the surface hydrologic connection between the adjacent water and the jurisdictional water. Pollutants can be attenuated or retained in such adjacent waters through processes including denitrification, ammonia volatilization, microbial and plant biomass assimilation, sedimentation, sorption and precipitation reactions, biological uptake, and long-term storage in plant detritus. *Id.* at 5–29 (citing K.R. Reddy, *et al.*, "Phosphorus Retention in Streams and Wetlands: A Review," *Critical Reviews in Environmental Science and Technology* 29:83–146 (1999); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Through retention and mitigation of pollutants and other chemical compounds, adjacent waters with a surface hydrologic connection to jurisdictional waters can substantially improve water quality downstream.

Wetlands and open waters with confined surface connections can affect the biological integrity of waters to which they connect. Movement of organisms between these adjacent waters and the nearby jurisdictional water is governed by many of the same factors that affect movement of organisms between riparian/floodplain waters and the river network. *Id.* at 5–31. Because such waters are at least periodically hydrologically connected to the nearby jurisdictional tributary network on the surface, dispersal of organisms can occur actively through the surface connection or via wind dispersal, hitchhiking, walking, crawling, or flying. *See, e.g., id.* at 5–31. For example, waterborne dispersal of aquatic and emergent plants can occur between the jurisdictional water and the neighboring water due to the periodic hydrologic connection to the tributary system. *Id.* at 5–31 (citing C. Nilsson, *et al.*, "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010)). Fish can also move between the jurisdictional water and the neighboring water to which it is connected via a surface hydrologic connection during periodic surficial hydrologic connections. *Id.* at 5–32 (citing J.W. Snodgrass, *et al.*, "Factors affecting the occurrence and structure of fish assemblages in isolated wetlands of the upper coastal plain, USA," *Canadian Journal of Fisheries and Aquatic Sciences* 53:443–454 (1996); K.D. Zimmer, *et al.*, "Effects of fathead minnow colonization and removal on a prairie wetland ecosystem," *Ecosystems* 4:346–357 (2001); M.J. Babor, *et al.*, "Controls on fish distribution and abundance in temporary wetlands," *Canadian Journal of Fisheries and Aquatic Sciences* 59:1441–1450 (2002); M.A. Hanson, *et al.*, "Biotic interactions as determinants of ecosystem structure in prairie wetlands: An example using fish," *Wetlands* 25:764–775 (2005);, B.R. Herwig, *et al.*, "Factors influencing fish distributions in shallow lakes in prairie and prairie-parkland regions of Minnesota, USA," *Wetlands* 30:609–619 (2010)). Mammals and aquatic and semi-aquatic amphibians and reptiles that can disperse overland can also contribute to connectivity, as can aquatic birds, particularly given the close proximity of the neighboring water to the jurisdictional water. Mammals and birds can act as transport vectors for hitchhikers like algae or aquatic insects. *Id.* at 5–32 (citing J.P. Roscher, "Alga Dispersal by Muskrat Intestinal Contents," Transactions of the American Microscopical Society 86:497–498 (1967)); J. Figuerola and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: a Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); J. Figuerola, *et al.*, "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates," *American Naturalist* 165:274–280 (2005)). Amphibians and reptiles move between streams and their adjacent waters to satisfy part of their life-history requirements. *Id.*at 5–33, Table 5–2. The hydrologic connection between neighboring waters with a surface connection to the jurisdictional water allows for that movement to occur either in the water or over land. Aquatic insects that use both streams and their adjacent waters can move outside of the stream network to the nearby wetland or open water to seek suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging or breeding, and then return to the stream for other life-history requirements. *Id.* at 5–33 (citing D.D. Williams, "Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna," *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, "Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates," *Ecology Letters* 6:783–796 (2003)). Neighboring waters with a confined surface hydrologic connection to jurisdictional waters help to maintain various biological populations, which periodically replenish adjacent jurisdictional waters, serving to maintain the biological integrity of (a)(1) through (a)(3) waters.

A shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found in steeply sloping areas with shallow soils and soils with a restrictive horizon that prevents vertical water flow, or in karst systems. K.J. Devito, *et al.*, "Groundwater Surface Water Interactions in Headwater Forested Wetlands of the Canadian Shield," *Journal of Hydrology* 181:127–47 (1996); M.A. O'Driscoll and R.R. Parizek, "The Hydrologic Catchment Area of a Chain of Karst Wetlands in Central Pennsylvania, USA," *Wetlands* 23:171–79 (2003); B.J. Cook and F.R. Hauer, "Effects of Hydrologic Connectivity on Water Chemistry, Soils, and Vegetation Structure and Function in an Intermontane Depressional Wetland Landscape," *Wetlands* 27:719–38 (2007). Shallow subsurface connections may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. The presence of an aquiclude (impervious layer) near the surface leads to shallow subsurface flows through the soil, which favors local groundwater flowpaths that connect to nearby wetlands or streams. Report at 3–38.

Wetlands with shallow subsurface connections can affect the physical integrity of waters to which they connect. In general, the volume and sustainability of streamflow within river networks depends on contributions from groundwater, especially in areas with shallow groundwater tables and pervious (meaning water can easily pass through) subsurfaces. *Id.* at 3–12 (citing J.J. de Vries, "Seasonal Expansion and Contraction of Stream Networks in Shallow Groundwater Systems," *Journal of Hydrology* 170:15–26 (1995); T.C. Winter, "The Role of Groundwater in Generating Streamflow in Headwater Areas and in Maintaining Base Flow," *Journal of the American Water Resources Association* 43:15–25 (2007); G.R. Kish, *et al.*, "A Geochemical Mass-Balance Method for Base-Flow Separation, Upper Hillsborough River Watershed, West-Central Florida, 2003–2005 and 2009," *USGS Scientific Investigations Report 2010–5092* (Washington, DC: U.S. Department of the Interior, U.S. Geological Survey, 2010). Because wetlands with shallow subsurface connections to streams and rivers provide some of these groundwater contributions, they influence the flow regime. Wetlands connected via shallow subsurface connections also can act as water sinks when evapotranspiration is high, but as water sources when evapotranspiration is low. *Id.*

at 3–25. As a result, these adjacent waters moderate peak flows, reduce downstream flooding, and provide runoff to help maintain baseflow for streams during times of low flows.

Wetlands and other waters with shallow subsurface connections affect the chemical and biological integrity of downstream waters in ways similar to wetlands with surface connections. The distance between these wetlands and jurisdictional waters may influence the connectivity since wetlands with shorter distances to the stream network will have higher hydrological and biological connectivity than wetlands located further from the same network. *Id.* at 3–43. The distance between the wetland and water may also influence whether waters are connected via surface or shallow subsurface hydrologic connections, as wetlands and open waters that are closer to rivers and streams will have a higher probability of being connected than more distant waters, assuming that conditions governing type and quantity of flows (*e.g.* slope, soil and aquifer permeability) are similar. *Id.* at 5–2. For wetlands connected to tributaries through groundwater flows, less distant wetlands/waters are generally connected through shallower flowpaths, assuming similar soil and geologic properties. *Id.* at 3–41 (Figure 3–5), 3–42. These shallower subsurface flows have the greatest interchange with surface waters and travel between points in the shortest amount of time. *Id.* at 3–42.

3. Adjacent Waters, Including Wetlands, Separated From Other "Waters of the United States" by Man-Made Dikes or Barriers, Natural River Berms, Beach Dunes and the Like Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

The terms earthen dam, dike, berm, and levee are used to describe similar structures whose primary purpose is to help control flood waters. Such structures vary in scale and size. A levee is an embankment whose primary purpose is to furnish flood protection from seasonal high water and which is therefore subject to water loading for periods of only a few days or weeks a year. Earthen embankments that are subject to water loading for prolonged periods (longer than normal flood protection requirements) are called earth dams. There are a wide variety of types of structures and an even wider set of construction methods. These range from a poorly constructed, low earthen berm pushed up by a backhoe to a well-constructed, impervious core, riprap lined levee that protects houses and cropland. Generally, levees are built to detach the floodplain from the channel, decreasing overbank flood events. S.B. Franklin, *et al.*, "Complex Effects of Channelization and Levee Construction on Western Tennessee Floodplain Forest Function," *Wetlands* 29(2): 451–464 (2009). The investigation methods to determine the presence or absence of the hydrologic connection depend on the type of structure, the underlying soils, the presence of groundwater, and the depth of the water table. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design—Design and Construction of Levees, EM 1110–2–1913 (Washington, DC, Department of the Army, 2000), p. 1–1.

Man-made berms and the like are fairly common along streams and rivers across the United States and often accompany stream channelization. S.B. Franklin, *et al.*, "Complex Effects of Channelization and Levee Construction on Western Tennessee Floodplain Forest Function," *Wetlands* 29(2): 451–464 (2009). One study conducted in Portland, Oregon found that 42% of surveyed wetlands had dams, dikes, or berms. M. Kentula, *et al.*, "Tracking Changes in Wetlands with Urbanization: Sixteen Years of Experience in Portland, Oregon, USA," *Wetlands* 24(4):734–743 (2004). Likewise, over 90% of the tidal freshwater wetlands of the Sacramento-San Joaquin Delta have been diked or leveed. C. Simenstad, *et al.*, "Preliminary Results from the Sacramento-San Joaquin Delta Breached Levee Wetland Study," *Interagency Ecological Program for the Sacramento-San Joaquin Estuary Newsletter* 12(4):15–21 (1999). At least 40,000 kilometers of levees, floodwalls, embankments, and dikes are estimated across the United States, with approximately 17,000 kilometers of levees in the Upper Mississippi Valley alone. SE. Gergel, *et al.*, "Consequences of Human-altered Floods: Levees, Floods, and Floodplain Forests along the Wisconsin River," *Ecological Applications* 12(6): 1755–1770 (2002).

Adjacent waters separated from the tributary network by dikes, levees, berms and the like continue to have a hydrologic connection to downstream waters. This is because berms and similar features typically do not block all water flow. Indeed, even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself. *See, e.g.*, International Atomic Energy Agency, Factsheet on Investigating Leaks through Dams and Reservoirs, *http://www.tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf*; U.S. Bureau of Reclamation, Provo Office, Safety of Dams, *http://www.usbr.gov/uc/provo/progact/damsafety.html*; Federal Energy Regulatory Commission (FERC), "Chapter 14: Dam Safety Performance Monitoring Program," Engineering Guidelines for the Evaluation of Hydropower Projects (FERC, 2005), pp. 14–36 to 14–39.

Seepage is the flow of a fluid through the soil pores. Seepage through a dam, through the embankments, foundations or abutments, or through a berm is a normal condition. D.A. Kovacic, *et al.*, "Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage," *Journal of Environmental Quality* 29(4): 1262–1274 (2000); Federal Energy Regulatory Commission (FERC), "Chapter 14: Dam Safety Performance Monitoring Program," Engineering Guidelines for the Evaluation of Hydropower Projects (FERC, 2005), pp. 14–36 to 14–39. This is because water seeks paths of least resistance through the berm or dam and its foundation. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002), *http://www.michigan.gov/deq/0,1607,7-135-3313_3684_3723-9515-,00.html*. All earth and rock-fill dams are subject to seepage through the embankment, foundation, and abutments. Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110–2–1901, (Washington, DC: Department of the Army, Original 1986—Revised 1993), Page 1–1; Department of the Army, U.S. Army Corps of Engineers, Engineering and Design: General Design and Construction Considerations for Earth and Rock-filled Dams, EM 1110–2–2300 (Washington, DC: Department of the Army, 2004), pp. 6–1 to 6–7. Concrete gravity and arch dams similarly are subject to seepage through the foundation and abutments. Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110–2–1901 (Washington, DC: Department of the Army, Original 1986 Revised 1993), Page 1–1. Levees and the like are subject to breaches and breaks during times of floods. C. Nilsson, *et al.*, "Fragmentation and Flow Regulation of the World's Large River Systems," *Science* 308(5720):405–408 (2005). Levees are similarly subject to failure in the case of extreme events, such as the extensive levee failures caused by Hurricanes Katrina and Rita. J.W. Day, *et al.*, "Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita," *Science* 315(5819): 1679–1684 (2007). In designing levees and similar structures, seepage control is necessary to prevent possible failure caused by excessive uplift pressures, instability of the downstream slope, piping through the embankment and/or foundation, and erosion of material by migration into open joints in the foundation and abutments. *Id.*; D.A. Kovacic, *et al.*, "Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage," *Journal of Environmental Quality* 29(4): 1262–1274 (2000); U.S. Department of the Interior, Bureau of Reclamation, Upper Colorado Region, see *http://www.usbr.gov/uc/provo/progact/damsafety.html*; International Atomic Energy Agency, Investigating Leaks through Dams and Reservoirs, see *http://www-tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf*; California Division of Safety of Dams, Embankment Design, see *http://damsafety.water.ca.gov/guidelines/embankment.htm*.

The rate at which water moves through the embankment depends on the type of soil in the embankment, how well it is compacted, the foundation and abutment preparation, and the number and size of cracks and voids within the embankment. All but the smallest earthen dams are commonly built with internal subsurface drains to intercept water seeping from the reservoir (i.e., upstream side) to the downstream side. Department of the Army, U.S. Army Corps of Engineers, Construction Control for Earth and Rock-filled Dams, EM 1110–2–1911, September 30, 1995, Washington, DC 20314–1000, Page 1–1. Where it is not intercepted by a subsurface drain, the seepage will emerge downstream from or at the toe of the embankment. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002), *http://www.michigan.gov/deq/0,1607,7-135-*

3313_3684_3723-9515_00.html. Seepage may vary in appearance from a "soft," wet area to a flowing "spring." It may show up first as an area where the vegetation is lush and darker green. Cattails, reeds, mosses, and other marsh vegetation may grow in a seepage area. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002), *http://www.michigan.gov/deq/0,1607,7-135-3313_3684_3723-9515_00.html.*

Engineered berms are typically designed to interfere with the seasonal pattern of water level (hydroperiod) of the area behind the berm, reducing the frequency and severity of inundation. Berms are not designed to eliminate all hydrologic connection between the channel on one side and the area behind the berm on the other. It is almost always impracticable to build a berm that will not be overtopped by a flood of maximum severity, and most berms are not designed to withstand severe floods. *See, e.g.,* Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110–2–1901, (Washington, DC: Department of the Army, Original 1986—Revised 1993), Page 1–1. Levees are designed to allow seepage and are frequently situated on foundations having natural covers of relatively fine-grain impervious to semipervious soils overlying pervious sands and gravels. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design: Design Guidance for Levee Underseepage, ELT 1110–2–569, Washington, DC: Department of the Army, 2005), pp. 1–9. These surface strata constitute impervious or semipervious blankets when considered in connection with seepage. Principal seepage control measures for foundation underseepage are (a) cutoff trenches, (b) riverside impervious blankets, (c) landslide berms, (d) pervious toe trenches, and (e) pressure relief wells. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design—Design and Construction of Levees, EM 1110–2–1913 (Washington, DC, Department of the Army, 2000), p. 1–1. Overtopping of an embankment dam is very undesirable because the embankment materials may be eroded away. Additionally, only a small number of concrete dams have been designed to be overtopped. Water normally passes through the main spillway or outlet works; it should pass over an auxiliary spillway only during periods of high reservoir levels and high water inflow. All embankment and most concrete dams have some seepage. *See, e.g., http://www.damsafety.org/layout/subsection.aspx?groupid=14&contentid=47.* However, it is important to control the seepage to prevent internal erosion and instability. Proper dam construction, and maintenance and monitoring of seepage provide control.

Berm-like landforms known as natural levees occur naturally and do not isolate adjacent wetlands from the streams that form them. Natural levees and the wetlands and waters behind them are part of the floodplain, including along some small streams and streams in the Arid West. C.A. Johnston, *et al.,* "Nutrient Dynamics in Relation to Geomorphology of Riverine Wetlands," *Soil Science Society of America Journal* 65(2):557–577 (2001). Every flowing watercourse transports not only water, but sediment—eroding and rebuilding its banks and floodplains continually. Federal Interagency Stream Restoration Working Group, *Stream Corridor Restoration: Principles, Processes and Practices,* USDA National Engineering Handbook Part 653 (1999). Different deposition patterns occur under varying levels of streamflow, with higher flows having the most influence on the resulting shape of streambanks and floodplains. *Id.* In relatively flat landscapes drained by low-gradient streams, this natural process deposits the most sediment on the bank immediately next to the stream channel while floodplains farther from the channel are usually lower-lying wetlands ("backswamps" or "backwater wetlands") that receive less sediment. *See, e.g.,* C.A. Johnston, *et al.,* "The Potential Role of Riverine Wetlands as Buffer Zones," *in* N.E. Haycock, *et al.,* ed., *Buffer Zones Their Processes and Potential in Water Protection* (Quest International, 1997), pp. 155–170. The somewhat elevated land thus built up at streamside is called a natural levee, and this entirely natural landform is physically and hydrologically similar to narrow, man-made berms. *See, e.g.,* L.B. Leopold, *et al., Fluvial Processes in Geomorphology* (Toronto: General Publishing Co. Ltd., 1964). Natural levees are discontinuous, which allows for a hydrologic connection to the stream or river via openings in the levees and thus the periodic mixing of river water and backwater. C.A. Johnston, *et al.,* "Nutrient Dynamics in Relation to Geomorphology of Riverine Wetlands," *Soil Science Society of America Journal* 65(2): 557–577 (2001). In addition, streams with natural levees, in settings with no human interference whatsoever, retain hydrologic connection with their wetlands behind the levees by periodic flooding during high water and via seepage through and under the levee. Similarly, man-made berms are typically periodically overtopped with water from the near-by stream, and as previously mentioned, are connected via seepage.

Waters, including wetlands, separated from a stream by a natural or man-made berm serve many of the same functions as those discussed above on other adjacent waters. Furthermore, even in cases where a hydrologic connection may not exist, there are other important considerations, such as chemical and biological factors, that result in a significant nexus between the adjacent wetlands or waters and the nearby "waters of the United States," and (a)(1) through (a)(3) waters.

The movement of surface and subsurface both over berms and through soils and berms adjacent to rivers and streams is a hydrologic connection between wetlands and flowing watercourses. The intermittent connection of surface waters over top of, or around, natural and manmade berms further strengthens the evidence of hydrologic connection between wetlands and flowing watercourses. Both natural and man-made barriers can be topped by occasional floods or storm events. *See, e.g.,* R.E. Turner, et al., "Wetland Sedimentation from Hurricanes Katrina and Rita," *Science* 314(5798): 449–452 (2006); P.A. Keddy, *et al.,* "The Wetlands of Lakes Pontchartrain and Maurepas: Past, Present and Future," *Environmental Reviews* 15: 43–77 (2007). When berms are periodically overtopped by water, wetlands and waters behind the barriers are directly connected to and interacting with the nearby stream and its downstream waters. In addition, surface waters move to and from adjacent soils (including adjacent wetland soils) continually. Along their entire length, streams alternate between effluent (water-gaining) and influent (water-losing) zones as the direction of water exchange with the streambed and banks varies. Federal Interagency Stream Restoration Working Group, *Stream Corridor Restoration: Principles, Processes and Practices,* USDA National Engineering Handbook Part 653 (1999). The adjacent areas involved in this surface water exchange with a stream or river are known as the hyporheic zone. Hyporheic zone waters are part of total surface waters temporarily moving through soil or sediment. Like within-channel waters, these waters are oxygenated and support living communities of organisms in the hyporheic zone.

Because a hydrologic connection between adjacent wetlands and waters and downstream waters still exists despite the presence of a berm or the like, the chemical and biological connections that rely on a hydrologic connection also exist. For instance, adjacent waters behind berms can still serve important water quality functions, serving to filter pollutants and sediment before they reach downstream waters. Wetlands behind berms can function to filter pollutants before they enter the nearby tributary, with the water slowly released to the stream through seepage or other hydrological connections. *See, e.g.,* L.L. Osborne and D.A. Kovacic, "Riparian Vegetated Buffer Strips in Water-Quality Restoration and Stream Management," *Freshwater Biology* 29(2): 243–258 (1993); D.A. Kovacic, *et al.,* "Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage," *Journal of Environmental Quality* 29(4): 1262–1274 (2000). Their ability to retain sediment and floodwaters may be enhanced by the presence of the berm. For instance, some backwater wetlands in floodplain/riparian areas exhibit higher sedimentation rates than streamside locations. E.J. Kuenzler, *et al.,* "Distributions and Budgets of Carbon, Phosphorus, Iron and Manganese in a Floodplain Swamp Ecosystem," *Water Resources Research Institute Report 157* (Chapel Hill, NC: University of North Carolina, 1980); C.A. Johnston, *et al.,* "Nutrient Dynamics in Relation to Geomorphology of Riverine Wetlands," *Soil Science Society of America Journal* 65(2): 557–577 (2001). The presence of manmade levees can actually increase denitrification rates, meaning that the adjacent waters can more quickly transform nitrogen. SE. Gergel, *et al.,* "Do Dams and Levees Impact Nitrogen Cycling? Simulating the Effects of Flood Alterations on Floodplain Denitrification," *Global Change Biology* 11(8): 1352–1367 (2005). However, the presence of manmade berms does limit

the ability of the river to connect with its adjacent wetlands through overbank flooding and thus limits sediment, water and nutrients transported from the river to the adjacent waters. *Id.;* J.L. Florsheim and J.F. Mount, "Changes in Lowland Floodplain Sedimentation Processes: Pre-disturbance to Post-rehabilitation, Cosumnes River, CA," *Geomorphology* 56(3–4):305–323 (2003). However, the presence of a berm does not completely eliminate the transport of sediments and water from the river to the nearby adjacent wetland, as suspended sediments and water can overflow both natural and man-made levees, though the transport is usually more pronounced in settings with natural levees. *See, e.g.,* R.E. Turner, *et al.,* "Wetland Sedimentation from Hurricanes Katrina and Rita," *Science* 314(5798):449–452 (2006); P.A. Keddy, *et al.,* "The Wetlands of Lakes Pontchartrain and Maurepas: Past, Present and Future," *Environmental Reviews* 15:43–77 (2007). Sediment deposition over levees is particularly enhanced by extreme events like hurricanes. *Id.;* D.J. Reed, *et al.,* "Reducing the Effects of Dredged Material Levees on Coastal Marsh Function: Sediment Deposition and Nekton Utilization," *Environmental Management* 37(5):671–685 (2006). Wetlands behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. J.W. Day, *et al.,* "Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita," *Science* 315(5819):1679–1684 (2007).

Adjacent waters, including wetlands, separated from water bodies by berms and the like maintain ecological connection with those water bodies. Though a berm may reduce habitat functional value and may prevent some species from moving back and forth from the wetland to the river, many major species that prefer habitats at the interface of wetland and stream ecosystems remain able to utilize both habitats despite the presence of such a berm. Additional species that are physically isolated in either stream or wetlands habitat still interact ecologically with species from the other component. Thus, adjacent wetlands with or without small berms can retain numerous similarities in ecological function. For example: Wetland bird species such as wading birds are able to utilize both wetland and adjacent stream/ditch habitats; wetland amphibians would be able to bypass the berm in their adult stage; aquatic invertebrates and fish would still interact with terrestrial/wetland predators and prey in common food web relationships despite the presence of a berm. *See, e.g.,* G.S. Butcher, and B. Zimpel, "Habitat Value of Isolated Waters to Migratory Birds," Prepared by Cornell Laboratory of Ornithology and The Cadmus Group, Inc. for U.S. Environmental Protection Agency Office of Wetlands Protection, (Washington, DC: Cornell and Cadmus, 1991); M.F. Willson and K.C. Halupka, "Anadromous Fish as Keystone Species in Vertebrate Communities," *Conservation Biology* 9(3):489–497 (1995); C.J. Cederholm, *et al.,* "Pacific Salmon Carcasses: Essential Contributions of Nutrients and Energy for Aquatic and Terrestrial Ecosystems," *Fisheries* 24(10):6–15 (1999); S.S. Schwartz and D.G. Jenkins, "Temporary Aquatic Habitats: Constraints and Opportunities," *Aquatic Ecology* 34:3–8 (2000); D.T. Bilton, *et al.,* "Dispersal in Freshwater Invertebrates," *Annual Review of Ecology and Systematics* 32:159–81 (2001).

One example of adjacent waters behind berms and the like are interdunal wetlands located in coastal areas, including some areas of the Great Lakes and along barrier islands. Interdunal wetlands form in swales or depressions within open dunes or between beach ridges along the coast and experience a fluctuating water table seasonally and yearly in synchrony with sea or lake level changes. W.E. Odum, "Non-Tidal Freshwater Wetlands in Virginia," *Virginia Journal of Natural Resources Law* 7: 421–434 (1988); D.A. Albert, *Borne of the Wind: An Introduction to the Ecology of Michigan Sand Dunes* (Lansing, MI: Michigan Natural Features Inventory, 2000), 63 pp.; D.A. Albert, *Between Land and Lake: Michigan's Great Lakes Coastal Wetlands,* Bulletin E–2902 (East Lansing, MI: Michigan Natural Features Inventory, Michigan State University Extension, 2003), 96 pp; D.A. Albert, *Natural Community Abstract for Interdunal Wetland* (Lansing, MI: Michigan Natural Features Inventory, 2007), 6 pp. For those along the ocean coast, they are typically formed as a result of oceanic processes where the wetlands establish behind relict dune ridges (dunes that were formed along a previously existing coast line). Wetlands in the interdunal system are in close proximity to each other and to the surrounding (a)(1) through (a)(3) waters. Their proximity to one another and to the (a)(1) through (a)(3) waters indicates a close physical relationship between interdunal wetland systems and the traditional navigable waters, interstate waters, or the territorial seas. Despite the presence of the beach dunes, interdunal wetlands have chemical, physical, or biological connections that greatly influence the integrity of the nearby (a)(1) through (a)(3) waters. The wetlands are hydrologically connected to these (a)(1) through (a)(3) waters through unconfined, directional flow and shallow subsurface flow during normal precipitation events and extreme events. As previously noted, they are linked to the rise and fall of the surrounding tides—the water-level fluctuations of the nearby (a)(1) through (a)(3) waters are important for the dynamics of the wetlands. D.A. Albert, *Between Land and Lake: Michigan's Great Lakes Coastal Wetlands,* Bulletin E–2902 (East Lansing, MI: Michigan Natural Features Inventory, Michigan State University Extension, 2003), 96 pp. The wetlands provide floodwater storage and attenuation, retaining and slowly releasing floodwaters before they reach the nearby (a)(1) through (a)(3) waters. Like other adjacent wetlands, interdunal wetlands also have important chemical connections to the nearby (a)(1) through (a)(3) waters, as they serve important water quality benefits. The wetlands store sediment and pollutants that would otherwise reach the surrounding (a)(1) through (a)(3) waters. The wetlands are biologically connected to the surrounding (a)(1) through (a)(3) waters. For instance, they provide critical habitats for species that utilize both the wetlands and the nearby (a)(1) through (a)(3) waters, supporting high diversity and structure. Habitat uses include basic food, shelter, and reproductive requirements. Aquatic insects, amphibians, and resident and migratory birds all use interdunal wetlands as critical habitat, and the wetlands provide better shelter than the nearby exposed beach. D.A. Albert, *Borne of the Wind: An Introduction to the Ecology of Michigan Sand Dunes* (Lansing, MI: Michigan Natural Features Inventory, 2000), 63 pp.; S.M. Smith, *et al.,* "Development of Vegetation in Dune Slack Wetlands of Cape Cod National Seashore (Massachusetts, USA)," *Plant Ecology* 194(2): 243–256 (2008). In marine coastal areas, the wetlands are often the only freshwater system in the immediate landscape, thus providing critical drinking water for the species that utilize both the wetlands and the nearby (a)(1) through (a)(3) waters, although some interdunal wetlands are brackish in nature. *See, e.g.,* C.M. Heckscher and C.R. Bartlett, "Rediscovery and Habitat Associations of Photuris Bethaniensis McDermott (Coleoptera: Lampyridae)," *The Coleopterists Bulletin* 58(3): 349–353 (2004).

Wetlands behind the extensive levee system in the Yazoo Basin are an example of adjacent waters behind man-made barriers. A regional hydrogeomorphic approach guidebook for the Yazoo Basin of the Lower Mississippi River Alluvial Valley assesses the functions of these wetlands. R.D. Smith and C.V. Klimas, *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valle,* Prepared for the U.S. Army Corps of Engineers, ERDC/EL TR–02–4 (2002). An extensive levee system was built along the river system to prevent flooding of the Mississippi River, resulting in drastic effects to the hydrology of the basin. *Id.* at 47. Despite the alteration of hydrology in the basin, extensive wetlands systems still exist behind the man-made and natural levees and maintain a hydrologic connection to the river system. These wetlands detain floodwater, detain precipitation, cycle nutrients, export organic carbon, remove elements and compounds, maintain plant communities, and provide fish and wildlife habitat. *Id.* The functions in turn provide numerous and substantial benefits to the nearby river.

4. Conclusions Regarding Adjacent Waters

The scientific literature documents that waters which are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of tributary networks to (a)(1) through (a)(3) waters because they are directly connected to streams via permanent surface features that concentrate, mix, transform, and transport water and other materials, including food resources, downstream to larger rivers. Adjacent wetlands and other adjacent waters filter pollutants before they enter the tributary system, they attenuate flow during flood events, they regulate flow rate and timing, they trap sediment, and they input organic material into rivers and streams, providing the basic building blocks for their

healthy functioning. These waters also are biologically connected to downstream waters by providing habitat and refuge to many species, and storing and releasing food sources. The scientific literature demonstrates that adjacent waters in a watershed together exert a strong influence on the character and functioning of rivers, streams and lakes.

Adjacent waters, as defined, alone or in combination with other adjacent waters in a watershed, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Based on studies of waters in riparian areas, flood plains, and their hydrologic connections through the tributary system there is sufficient scientific evidence regarding the important functions of these adjacent wetlands to demonstrate that, alone or in combination with similarly situated waters in the region, wetlands and open waters adjacent to any tributary have a significant effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The reviewed scientific literature supports the conclusion that adjacent waters generally play a larger role in the ecological condition of smaller tributary systems, which, in turn, determines the effects on the chemical, physical, and biological health of larger downstream waters.

iii. "Other Waters"

The Report includes a focused evaluation of the connections and effects to downstream waters for several regional types of streams and wetlands: Prairie streams, southwest intermittent and ephemeral streams, oxbow lakes, Carolina and Delmarva bays, prairie potholes, and vernal pools. These regional types were chosen for evaluation because they represent a broad geographic area as well as a diversity of water types based on their origin, landscape setting, hydrology, and other factors. Most prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters (with the exception of streams, for example, located in closed basins, which lack an (a)(1) through (a)(3) water or a connection thereto); similarly, most oxbow lakes are likely to be considered adjacent to (a)(1) through (a)(5) waters. Carolina and Delmarva bays, prairie potholes, and vernal pools may or may not be considered adjacent to (a)(1) through (a)(5) waters. Where waters are not considered tributaries (e.g. waters in a solely intrastate closed basin that does not contain a traditional navigable water, interstate water, or a territorial sea, or a connection thereto) or where waters, including wetlands, do not meet the proposed regulatory definition of adjacent, they should be evaluated to determine whether they are (a)(7) waters. The agencies seek comment on establishing such categories, as well as on other options for addressing "other waters."

The term "other waters" refers to waters that cannot be considered "adjacent" to downstream jurisdictional waters and that are not tributaries of such waters. "Other waters" are found outside the riparian zone and the floodplain, as waters within these areas are considered to be "adjacent." As such, wetlands that are "other waters" typically will have unidirectional flow. As mentioned in Part II, section 2.B. above, many unidirectional wetlands are considered adjacent and interact with downstream jurisdictional waters through channels, shallow subsurface flow, or by providing additional functions such as storage and mitigating peak flows. Unidirectional wetlands that lack a confined surface connection or a shallow subsurface connection to downstream waters and are surrounded by uplands will typically fall under the definition of "other waters," and are often referred to in scientific literature and policy as "geographically isolated waters." The term "geographically isolated" should not be used to implicate the lack of connectivity to downstream waters, as these wetlands are often connected to downstream waters through deeper groundwater connections, biological connections, or spillage. The degree of connectivity of such wetlands will vary depending on landscape features such as distance from downstream waters and proximity to other wetlands of similar nature that as a group connect to jurisdictional downstream waters. Report at 3–43, 5–2.

For purposes of assessing whether a particular water is a "water of the United States" because it, alone or in combination with other similarly situated waters, has a significant nexus to an (a)(1) through (a)(3) water, the agencies are proposing to define each of the elements of Justice Kennedy's significant nexus standard in the definition of "significant nexus."

A. In the Region

The agencies have determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of those systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate interpretation of Justice Kennedy's standard. *See, e.g.,* D.R. Montgomery, "Process Domains and the River Continuum," *Journal of the American Water Resources Association* 35:397–410 (1999).

Using a watershed as the framework for conducting significant nexus evaluations is scientifically supportable. Watersheds are generally regarded as the most appropriate spatial unit for water resource management. *See, e.g.,* J.M. Omernik and R.G. Bailey, "Distinguishing Between Watersheds and Ecoregions," *Journal of the American Water Resources Association* 33.5: 939–40 (1997); D.R. Montgomery, "Process Domains and the River Continuum," *Journal of the American Water Resources Association* 35: 397–410 (1999); T.C. Winter "The Concept of Hydrologic Landscapes," *Journal of the American Water Resources Association* 37: 335–49 (2001); J.S. Baron, *et al.,* "Meeting Ecological and Societal Needs for Freshwater," *Ecological Applications* 12: 1247–60 (2002); J.D. Allan, "Landscapes and Riverscapes: The Influence of Land Use on Stream Ecosystems," *Annual Review of Ecology Evolution and Systematics* 35: 257–84 (2004); United States, EPA 841–B–08–002: U.S. Environmental Protection Agency, *Handbook for Developing Watershed Plans to Restore and Protect Our Waters: Planning & Implementation Steps* (Washington D.C.: U.S. EPA, March 2008); P.J. Wigington, *et al.,* "Oregon Hydrologic Landscapes: A Classification Framework," *Journal of the American Water Resources Association* 49.1:163–82 (2013). Anthropogenic actions and natural events can have widespread effects within the watershed that collectively impact the quality of the relevant traditional navigable water, interstate water or territorial sea. United States, U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/2330462008: *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* (Washington, D.C.: U.S. EPA and USDA/ARS Southwest Watershed Research Center, Levick *et al.,* 2008) (Levick, *et. al.*). For these reasons, it is more appropriate to conduct a significant nexus determination at the watershed scale than to focus on a specific site, such as an individual stream segment. The watershed size reflects the specific water management objective, and is scaled up or down as is appropriate to meet that objective. If the objective is to manage the water quality in a particular receiving water body (the "target" water body), the watershed should include all those waters that are contributing to that target water since they will primarily determine the quality of the receiving water.

The watershed that drains to the single point of entry to a traditional navigable water, interstate water or territorial sea is a logical spatial framework for the evaluation of the nexus. This is because, from a water quality management perspective, the (a)(1), (a)(2) or (a)(3) water is the downstream affected water whose quality is dependent on the condition of the contributing upstream waters, including streams, lakes, and wetlands. To restore or maintain the health of the downstream affected water, it is standard practice to evaluate the condition of the waters that are in the contributing watersheds and to develop a plan to address the issues of concern. The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water or territorial sea. The size of that watershed can be determined by identifying the geographic area that drains to the nearest traditional navigable water, interstate water or the territorial sea, and then using that point of entry watershed to conduct a significant nexus evaluation. P.E. Black, "Watershed Functions," *Journal of the American Water Resources Association* 33.1:1–11 (1997).

The Corps is organized based on watersheds and has used watershed framework approaches for water sources, navigation approaches for over 100 years, and in the regulatory program since its inception. Also, using a watershed framework is consistent with over two decades of practice by EPA and many other governmental, academic, and other entities which recognize that a watershed approach is the most effective framework to address water resource challenges. U.S. Environmental Protection Agency, *The*

Watershed Protection Approach Framework (Oct. 1991). The agencies both recognize the importance of the watershed approach by investing in opportunities to advance watershed protection and in developing useful watershed tools and services. For example, EPA is allowing states that are reorganizing programs to function on a watershed basis to have short-term backlogs on CWA section 402 National Pollution Discharge Elimination System (NPDES) permit review—without penalty. This flexibility gives states time to synchronize the reissuance of major and minor permits within a watershed. By managing NPDES permits on a watershed basis, all the permits for discharges to the water body can be coordinated and the most efficient and equitable allocation of pollution control responsibility can be made. U.S. Environmental Protection Agency, *Why Watersheds?*, EPA 800–F–96–001 (February 1996). Applying a watershed approach continues to be a priority of EPA, and is one of the three key strategies the agency is using to drive progress toward the Agency's health and environmental goals over the next five years. U.S Environmental Protection Agency, *FY 2011–2015 Strategic Plan: Achieving Our Vision*, 2010.

B. Similarly Situated

Scientists routinely aggregate the effects of groups of waters, multiplying the known effect of one water by the number of similar waters in a specific geographic area, or to a certain scale. This kind of functional aggregation of non-adjacent (and other types of waters) is well supported in the scientific literature. *See, e.g.*, R.J. Stevenson and F.R. Hauer, "Integrating Hydrogeomorphic and Index of Biotic Integrity Approaches for Environmental Assessment of Wetlands," *Journal of the North American Benthological Society* 21(3): 502–514 (2002), S.C. Leibowitz, "Isolated Wetlands and Their Functions: An Ecological Perspective," *Wetlands* 23:517–531 (2003), D. Gamble, *et al.*, *An Ecological and Functional Assessment of Urban Wetlands in Central Ohio*, Ohio EPA Technical Report WET/2007–3B (Columbus, OH: Ohio Environmental Protection Agency, 2007), C.R. Lane and E. D'Amico, "Calculating the Ecosystem Service of Water Storage in Isolated Wetlands using LiDAR in North Central Florida, USA," *Wetlands* 30:967–977 (2010), B.P. Wilcox, *et al.*, "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31(3):451–8 (2011). Similarly, streams and rivers are routinely aggregated by scientists to estimate their combined effect on downstream waters in the same watershed. This is because chemical, physical, or biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow into them, including any tributaries and connected wetlands. As a result, the scientific literature and the Report consistently documents that the health of larger downstream waters is directly related to the aggregate health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to prevent floodwaters and contaminants from reaching downstream waters.

In the aggregate, similarly situated wetlands may have significant effects on the quality of water many miles away, particularly in circumstances where numerous similarly situated waters are located in the region and are performing like functions that combine to influence downstream waters. *See, e.g.*, A. Jansson *et al.*, "Quantifying the Nitrogen Retention Capacity of Natural Wetlands in the Large-Scale Drainage Basin of the Baltic Sea," *Landscape Ecology* 13:249–262 (1998); W.J. Mitsch *et al.*, "Reducing Nitrogen Loading to the Gulf of Mexico from the Mississippi River Basin: Strategies to Counter a Persistent Ecological Problem," *BioScience* 51(5): 373–388 (2001); M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4):705–15 (2012). Cumulatively, many small wetlands can hold a large amount of snowmelt and precipitation, reducing the likelihood of flooding downstream. Report at 5–25 (citing D.E. Hubbard and R.L. Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," *Journal of Soil and Water Conservation* 41(2):122–125 (1986)).

Scientists can and do routinely classify similar waters and wetlands into groups for a number of different reasons; because of their inherent physical characteristics, because they provide similar functions, because they were formed by similar geomorphic processes, and by their level of biological diversity, for example. Classifying wetlands based on their functions is also the basis for the U.S. Army Corps of Engineers hydrogeomorphic (HGM) classification of wetlands. M.M. Brinson, *A Hydrogeomorphic Classification for Wetlands* (Washington, D.C.: U.S. Army Corps of Engineers, 1993). The HGM method is a wetlands assessment approach pioneered by the Corps in the 1990s, and extensively applied via regional handbooks since then. The Corps HGM method uses a conceptual framework for identifying broad wetland classes based on common structural and functional features, which includes a method for using local attributes to further subdivide the broad classes into regional subclasses. Assessment methods like the HGM provide a basis for determining if waters provide similar functions based on their structural attributes and indicator species. Scientists also directly measure attributes and processes taking place in particular types of waters during in-depth field studies that provide reference information that informs the understanding of the functions performed by many types of aquatic systems nationwide.

These waters, primarily depressional wetlands, small open waters and peatlands, are known to have important hydrologic, water quality, and habitat functions which vary as a result of the diverse settings in which they exist across the country. For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. Report at 5–26 (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). Some of the important factors which influence the variability of their functions and connectivity include the topography, geology, soil features, antecedent moisture conditions, and seasonal position of the water table relative to the wetland. Report at 5–25.

When proposing that "other waters" are sufficiently close and should be considered similarly situated, it is recognized that they are more likely to have similar influence with regard to their effect on the chemical, physical, or biological integrity of a downstream water identified in paragraphs (a)(1) through (a)(3). If a water is a great distance from a group of similar "other waters," it may be performing some of the same functions as those in the group, but their distance from each other or from downstream (a)(1) through (a)(3) waters will decrease the probability that it has some kind of chemical, physical, or biological connectivity to the downstream water, assuming that conditions governing the type and quantity of flows (*e.g.* slope, soil, and aquifer permeability, etc.) are similar. *Id.* at 5–2, 5–41.

Consideration of the aggregate effects of wetlands and other waters often gives the most complete information about how such waters influence the chemical, physical, or biological integrity of downstream waters. In many watersheds, wetlands have a disproportionate effect on water quality relative to their surface area because wetland plants slow down water flow, allowing suspended sediments, nutrients, and pollutants to settle out. They filter these materials out of the water received from large areas, absorbing or processing them, and then releasing higher quality water. National Research Council, *Wetlands: Characteristics and Boundaries* (Washington, D.C.: National Academy Press, 1995), p. 98. For an individual wetland, this is most pronounced when it lies immediately upstream of a drinking water intake, for example. *See, e.g.*, C.A. Johnston, *et al.*, "The Cumulative Effect of Wetlands on Stream Water Quality and Quantity," *Biogeochemistry* 10:105–141 (1990).

The structure and function of a river are highly dependent on the constituent materials that are stored in, or transported through the river. Most of the materials found in rivers originate outside of them. Thus, the fundamental way that "other waters" are able to affect river structure and function is by providing or altering the materials delivered to the river. Report at 1–13. Since the alteration of material fluxes depends on the functions within these waters and the degree of connectivity, it is appropriate to consider both these factors for purposes of significant nexus under this provision.

Numerous factors affect chemical, physical, and biological connectivity, operating at multiple spatial and temporal scales, and interacting with each other in complex ways, to determine where components of aquatic systems fall on the connectivity-isolation gradient at a given time. Some of these factors include climate, watershed characteristics, spatial distribution

patterns, biota, and human activities and alterations. *Id.* at 3–33. Recognizing the limits on the ability to observe or document all of these interacting factors, it is reasonable to look for visible patterns in the landscape and waters that are often indicative of the connectivity factors, in determining what waters to aggregate. Due to relative similarity of soils, topography, or groundwater connections, for example, there may be a group of wetlands scattered throughout a watershed, at similar distances from the tributaries in the watershed and performing similar functions. It is appropriate to assess the significance of the nexus of those waters in the aggregate, consistent with Justice Kennedy's standard.

C. Significant Nexus

The scientific literature regarding "other waters" documents their functions, including the chemical, physical, and biological impact they can have downstream. Available literature indicates that "other waters" have important hydrologic, water quality, and habitat functions that have the ability to affect downstream waters if and when a connection exists between the "other water" and downstream waters. Report at 6–1. "Other waters" generally fit into the category of unidirectional waters as described in the Report. However, there are some unidirectional waters that are in fact adjacent under (a)(6) to (a)(1) through (a)(5) waters (*e.g.*, neighboring waters that are outside of the riparian area and/or floodplain but that have a surface or shallow subsurface hydrologic connection to (a)(1) through (a)(5) waters). Connectivity of "other waters" to downstream waters that do not meet the definition of adjacent will vary within a watershed and over time, which is why a case-specific significant nexus determination for "other waters" is necessary under (a)(7). *See, e.g., id.* at 6–2. The types of chemical, physical, and biological connections between "other waters" and downstream waters are described below for illustrative purposes. As described in the preamble above, when the agencies are conducting a case-specific determination for significant nexus under (a)(7), they examine the connections between the water (including any similarly situated waters in the region) and downstream waters and determine if those connections significantly affect the chemical, physical, or biological integrity of the downstream water, using any available site-information and field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been made on similar resources in the region.

The hydrologic connectivity of "other waters" to downstream waters occurs on a gradient and can include waters that have groundwater or occasional surface water connections (through overland flow) to the tributary network and waters that have no hydrologic connection to the tributary network. *Id.* at 5–1. The connectivity of "other waters" to downstream waters will vary within a watershed as a function of local factors (e.g. position, topography, and soil characteristics). *Id.* at 3–41 to 3–43. Connectivity also varies over time, as the tributary network and water table expand and contract in response to local climate. *Id.* at 3–31 to 3–33. Lack of connection does not necessarily translate to lack of impact; even when lacking connectivity, waters can still impact chemical, physical, and biological conditions downstream. *Id.* at 3–29, 3–31.

The physical effect that "other waters" have downstream is less obvious than the physical connections of waters that are adjacent or waters that are tributary, due to the physical distance of "other waters" from the stream network. Despite this physical distance, they are frequently connected in some degree through either surface water or groundwater systems; over time, impacts in one part of the hydrologic system will be felt in other parts. T.C. Winter and J.W. LaBaugh, "Hydrologic Considerations in Defining Isolated Wetlands," *Wetlands* 23:532–540 (2003) at 538. For example, "other waters" that overspill into downstream water bodies during times of abundant precipitation are connected over the long term. *Id.* at 539. Wetlands that lack surface connectivity in a particular season or year can, nonetheless, be highly connected in wetter seasons or years. Report at 5–22 to 5–25. Many "other waters" interact with groundwater, either by receiving groundwater discharge (flow of groundwater to the "other water"), contributing to groundwater recharge (flow of water from the "other water" to the groundwater), or both. *Id.* at 5–23 (citing R.F. Lide, *et al.*, "Hydrology of a Carolina Bay Located on the Upper Coastal Plain of Western South Carolina," *Wetlands* 15:47–57 (1995); K.J. Devito, *et al.*, "Groundwater Surface-Water Interactions in Headwater Forested Wetlands of the Canadian Shield," *Journal of Hydrology* 181:127–47 (1996); R.K. Mathewy and P.J. Gerla, "Environmental Isotopic Evidence for the Origins of Ground and Surface Water in a Prairie Discharge Wetland," *Wetlands* 16:109–120 (1996); D.O. Rosenberry and T.C. Winter, "Dynamics of Water-Table Fluctuations in an Upland between Two Prairie-Pothole Wetlands in North Dakota," *Journal of Hydrology* 191:266–289 (1997); J.E. Pyzoha, *et al.*, "A Conceptual Hydrologic Model for a Forested Carolina Bay Depressional Wetland on the Coastal Plain of South Carolina, USA," *Hydrological Processes* 22:2689–2698 (2008)). Factors that determine whether a water recharges groundwater or is a site of groundwater discharge include topography, geology, soil features, and seasonal position of the water table relative to the water. *Id.* at 5–24 (citing P.J. Phillips and R.J. Shedlock, "Hydrology and Chemistry of Groundwater and Seasonal Ponds in the Atlantic Coastal-Plain in Delaware, USA," *Journal of Hydrology* 141:157–78 (1993); R.J. Shedlock, *et al.*, "Interactions between Ground-Water and Wetlands, Southern Shore of Lake-Michigan, USA," *Journal of Hydrology* 141:127–55 (1993); D.O. Rosenberry and T.C. Winter, "Dynamics of Water-Table Fluctuations in an Upland Between two Prairie-Pothole Wetlands in North Dakota," *Journal of Hydrology* 191:266–89 (1997); J.E. Pyzoha, *et al.*, "A Conceptual Hydrologic Model for a Forested Carolina Bay Depressional Wetland on the Coastal Plain of South Carolina, USA," *Hydrological Processes* 22: 2689–98 (2008)). Similarly, the magnitude and transit time of groundwater flow from an "other water" to downstream waters depend on several factors, including the intervening distance and the properties of the rock or unconsolidated sediments between the water bodies (*i.e.*, the hydraulic conductivity of the material). *Id.* at 5–24. Surface and groundwater hydrological connections are those generating the capacity for "other waters" to affect downstream waters, as water from the "other water" may contribute to baseflow or stormflow through groundwater recharge. *Id.* at 5–25. Contributions to baseflow are important for maintaining conditions that support aquatic life in downstream waters. As discussed further below, even in cases where waters lack a connection to downstream waters, they can influence downstream water through water storage and mitigation of peak flows. *Id.* at 5–36.

The chemical effects that "other waters" have on downstream waters are linked to their hydrologic connection downstream, though a surface connection is not needed for a water to influence the chemical integrity of the downstream water. Because the majority of "other waters" are hydrologically connected to downstream waters via surface or groundwater connections, most "other waters" can affect water quality downstream (although those connections do not meet the definition of adjacency). D.F. Whigham and T. E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003) at 542. "Other waters" can act as sinks and transformers for nitrogen and phosphorus, metals, pesticides, and other contaminants that could otherwise negatively impact downstream waters. Report at 5–30 (citing R.R. Brooks, *et al.*, "Cobalt and Nickel Uptake by the Nyssaceae," *Taxon* 26:197–201 (1977); H.F. Hemond, "Biogeochemistry of Thoreau's Bog, Concord, Massachusetts," *Ecological Monographs* 50:507–526 (1980); C.B. Davis, *et al.*, "Prairie Pothole Marshes as Traps for Nitrogen and Phosphorus in Agricultural Runoff," *in* B. Richardson, ed., *Selected Proceedings of the Midwest Conference on Wetland Values and Management, June 17–19, 1981, St. Paul, MN,* (St. Paul, MN: The Freshwater Society, 1981), pp. 153–163; H.F. Hemond, "The Nitrogen Budget of Thoreau's Bog," *Ecology* 64:99–109 (1983); K.C. Ewel and H.T. Odum, ed., *Cypress Swamps,* (Gainesville, Florida: University of Florida Press, 1984); J.T. Moraghan, "Loss and Assimilation of 15N-nitrate Added to a North Dakota Cattail Marsh," *Aquatic Botany* 46:225–234 (1993); C.M. Kao, *et al.*, "Non-point Source Pesticide Removal by a Mountainous Wetland," *Water Science and Technology* 46:199–206 (2002); P.I. Boon, "Biogeochemistry and Bacterial Ecology of Hydrologically Dynamic Wetlands," *in* D.P. Batzer and R.R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176; E.J. Dunne, *et al.*, "Phosphorus Release and Retention by Soils of Natural Isolated Wetlands," *International Journal of Environment and Pollution* 28:496–516 (2006); T.E. Jordan, *et al.*, "Comparing Functional Assessments of Wetlands to Measurements of Soil Characteristics and Nitrogen Processing," *Wetlands* 27:479–497

(2007); S.L. Whitmire and S.K. Hamilton, "Rates of Anaerobic Microbial Metabolism in Wetlands of Divergent Hydrology on a Glacial Landscape," *Wetlands* 28:703–714 (2008)). Also *see, e.g.*, T.M. Isenhart, *Transformation and Fate of Nitrate in Northern Prairie Wetlands*, Ph.D. Dissertation (Ames, Iowa: Iowa State University, 1992). The body of published scientific literature and the Report indicate that sink removal of nutrients and other pollutants by "other waters" is significant and geographically widespread. Report at 5–30. Water quality characteristics of "other waters" are highly variable, depending primarily on the source of water, characteristics of the substrate, and land uses within the watershed. D.F. Whigham and T.E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003) at 541. These variables inform whether an "other water" has a significant nexus to an (a)(1) through (a)(3) water. For instance, some prairie potholes may improve water quality and may efficiently retain nutrients that might otherwise cause water quality problems downstream; in such systems it may be their lack of a direct hydrologic connection that enables the prairie potholes to more effectively retain nutrients. *Id.* at 543.

"Other waters" can be biologically connected to each other and to downstream waters through the movement of seeds, macroinvertebrates, amphibians, reptiles, birds, and mammals. Report at 5–31 to 5–33; S.G. Leibowitz, "Isolated Wetlands and Their Functions: An Ecological Perspective," *Wetlands* 23:517–531 (2003) at 519. The movement of organisms between "other waters" and downstream waters is governed by many of the same factors that affect movement of organisms between adjacent wetlands and downstream waters (*See* Part II Section 2.A.d.). Report at 5–31. Generally, "other waters" are further away from stream channels than adjacent waters, making hydrologic connectivity less frequent, and increasing the number and variety of landscape barriers over which organisms must disperse. *Id.* Plants, though non-mobile, have evolved many adaptations to achieve dispersal over a variety of distances, including water-borne dispersal during periodic hydrologic connections, "hitchhiking" on or inside highly mobile animals, and more typically via wind dispersal of seeds and/or pollen. *Id.* at 5–31 (citing S.M. Galatowitsch and A.G. van der Valk, "The Vegetation of Restored and Natural Prairie Wetlands,"*Ecological Applications* 6:102–112 (1996); H.R. Murkin and P.J. Caldwell, "Avian Use of Prairie Wetlands," *in* H.R. Murkin, *et al.*, ed., *Prairie Wetland Ecology: The Contribution of the Marsh Ecology Research Program*, (Ames, IA: Iowa State University Press, 2000), pp. 249–286; J.M. Amezaga, *et al.*, "Biotic Wetland Connectivity—Supporting a New Approach for Wetland Policy," *Acta Oecologica-International Journal of Ecology* 23:213–222 (2002); J. Figuerola and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: a Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); M.B. Soons and G.W. Heil, "Reduced Colonization Capacity in Fragmented Populations of Wind-Dispersed Grassland Forbs," *Journal of Ecology* 90:1033–1043 (2002); M.B. Soons, "Wind Dispersal in Freshwater Wetlands: Knowledge for Conservation and Restoration," *Applied Vegetation Science* 9:271–278 (2006); C. Nilsson, *et al.*, "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010)). Mammals that disperse overland can also contribute to connectivity and can act as transport vectors for hitchhikers such as algae. *Id.* at 5–32 (citing C.E. Shanks and C.C. Arthur, "Muskrat Movements and Population Dynamics in Missouri Farm Ponds and Streams," *Journal of Wildlife Management* 16:138–148 (1952); J.P. Ronchen, "Alga Dispersal by Muskrat Intestinal Contents," *Transactions of the American Microscopical Society* 86:497–498 (1967); W.R. Clark, "Ecology of Muskrats in Prairie Wetlands," *in* H.R. Murkin, *et al.*, ed., 2000, pp. 287–313)). Invertebrates also utilize birds and mammals to hitchhike, and these hitchhikers can be an important factor structuring invertebrate metapopulations in "other waters" and in aquatic habitats separated by hundreds of kilometers. *Id.* (citing J. Figuerola and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); J. Figuerola, *et al.*, "Invertebrate Eggs Can Fly: Evidence of Waterfowl Mediated Gene Flow in Aquatic Invertebrates," *American Naturalist* 165:274–280 (2005); M.R. Allen, "Measuring and Modeling Dispersal of Adult Zooplankton," *Oecologia* 153:135–143 (2007); D. Frisch, *et al.*, "High Dispersal Capacity of a Broad Spectrum of Aquatic Invertebrates Via Waterbirds," *Aquatic Sciences* 69:568–574 (2007)). Numerous flight-capable insects use both "other waters" and downstream waters; these insects move outside the tributary network to find suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging, or breeding, and then can return back to the tributary network for other lifecycle needs. *Id.* at 5–33 (citing D.D. Williams, "Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna," *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, "Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates," *Ecology Letters* 6:783–796 (2003)). Amphibians and reptiles also move between "other waters" and downstream waters to satisfy part of their life history requirements. *Id.* at 5–33. Alligators in the Southeast, for instance, can move from tributaries to shallow, seasonal limesink wetlands for nesting, and also use these wetlands as nurseries for juveniles; sub-adults then shift back to the tributary network through overland movements. *Id.* (citing A.L. Subalusky, *et al.*, "Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity between Aquatic Systems," *Biological Conservation* 142:1507–1514 (2009); A.L. Subalusky, *et al.*, "Detection of American Alligators in Isolated, Seasonal Wetlands," *Applied Herpetology* 6:199–210 (2009)). Similarly, amphibians and small reptile species, such as frogs, toads, and newts, commonly use both tributaries and "other waters," during one or more stages of their life cycle, and can at times disperse over long distances. *Id.* (citing V.S. Lamoureux and D.M. Madison, "Overwintering Habitats of Radio Implanted Green Frogs, *Rana clamitans*," *Journal of Herpetology* 33:430–435 (1999); K.J. Babbitt, *et al.*, "Patterns of Larval Amphibian Distribution along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology Revue Canadienne De Zoologie* 81:1539–1552 (2003); S.B. Adams, *et al.*, "Instream Movements by Boreal Toads (*Bufo boreas boreas*)," *Herpetological Review* 36:27–33 (2005); D.M. Green, "*Bufo americanus*, American Toad," *in* M. Lannoo, ed., *Amphibian Declines: The Conservation Status of the United States Species* (Berkeley, CA: University of California Press, 2005), pp. 702–704; T.W. Hunsinger and M.J. Lannoo, "*Notophthalmus viridescens*, Eastern Newt," *in* M. Lannoo, ed., 2005, pp. 912–914; J.W. Petranka and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404–411 (2006)).

Even when a surface or groundwater hydrologic connection between a water and a downstream water is visibly absent, many waters still have the ability to substantially influence the integrity of downstream waters. However, such circumstances would be uncommon. *Id.* at 5–22 to 5–25. Aquatic systems that may seem disconnected hydrologically are often connected but at irregular timeframes or through subsurface flow, and perform important functions that can be vital to the chemical, physical, or biological integrity of downstream waters. Some wetlands that are not adjacent may be hydrologically disconnected most of the time but connected to the stream network during rare high-flow events. The lack of a hydrologic connection also allows for water storage in "other waters," attenuating peak streamflows, and, thus, downstream flooding, and also reducing nutrient and soil pollution in downstream waters. Report at 5–25 to 5–26, 5–36. Prairie potholes a great distance from any tributary, for example, are thought to store significant amounts of runoff. *Id.* at 5–36 (citing R.P. Novitzki, "Hydrologic Characteristics of Wisconsin's Wetlands and Their Influence on Floods," *in* P. Greeson, *et al.*, ed., *Wetland Functions and Values: The Status of Our Understanding*, Proceedings of the National Symposium on Wetlands (Minneapolis, MN: American Water Resources Association, 1979), pp. 377–388; D.E. Hubbard and R.L. Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," *Journal of Soil and Water Conservation* 41:122–125 (1986); J. Jacques and D.L. Lorenz, "Techniques for Estimating the Magnitude and Frequency of Floods in Minnesota," *Water Resources Investigations Report* 87–4170, (St. Paul, MN: U.S. Geological Survey, 1988); K.C. Vining, "Simulation of Streamflow and Wetland Storage, Starkweather Coulee Subbasin, North Dakota, Water Years 1981–98," *Water-Resources Investigations Report* 02–4113 (Bismarck, North Dakota: U.S. Geological

Survey, 2002); R.A. Gleason, *et al., Estimating Water Storage Capacity of Existing and Potentially Restorable Wetland Depressions in a Subbasin of the Red River of the North,* U.S. Geological Survey Open-File Report 2007–1159 (Reston, VA: U.S. Geological Survey, 2007); D.L. Lorenz, *et al.,* "Techniques for Estimating the Magnitude and Frequency of Peak Flows on Small Streams in Minnesota Based on Through Water Year 2005," *USGS Scientific Investigations Report* 2009–5250, (Reston, VA: U.S. Geological Survey, 2010)). Filling wetlands reduces water storage capacity in the landscape and causes runoff from rainstorms to overwhelm the remaining available water conveyance system. *See, e.g.,* C.A. Johnston, *et al.,* "The Cumulative Effect of Wetlands on Stream Water Quality and Quantity," *Biogeochemistry* 10:105–141 (1990); A.L. Moscrip and D.R. Montgomery, "Urbanization, Flood Frequency, and Salmon Abundance in Puget Lowland Streams," *Journal of the American Water Resources Association* 33:1289–1297 (1997); N.E. Detenbeck, *et al.,* "Evaluating Perturbations and Developing Restoration Strategies for Inland Wetlands in the Great Lakes Basin," *Wetlands* 19(4): 789–820 (1999); N.E. Beck, *et al.,* "Relationship of Stream Flow Regime in the Western Lake Superior Basin to Watershed Type Characteristics," *Journal of Hydrology* 309(1–4): 258–276 (2005). Wetlands, even when lacking a hydrologic connection downstream, improve downstream water quality by accumulating nutrients, trapping sediments, and transforming a variety of substances. *See, e.g.,* National Research Council, *Wetlands: Characteristics and Boundaries* (Washington, DC: National Academy Press, 1995), p. 38.

Under today's proposal, on a case-specific basis, "other waters" that have a significant nexus to an (a)(1) through (a)(3) water are "waters of the United States" under (a)(7). The scientific literature and data in the Report and elsewhere support that some "other waters" (including some of those in the case studies), along with other similarly situated waters in the region, do greatly affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters, and thus would be jurisdictional under (a)(7).

Though much of the literature cited in the Report relates to "other waters" that are wetlands, the Report indicates that non-wetland waters that are not (a)(1) through (a)(6) waters also can have chemical, physical, or biological connections that significantly impact downstream waters. For instance, non-adjacent ponds or lakes that are not part of the tributary network can still be connected to downstream waters through chemical, physical, and biological connections. Lake storage has been found to attenuate peak streamflows in Minnesota. *Id.* at 5–25 (citing J. Jacques and D.L. Lorenz, *Techniques for Estimating the Magnitude and Frequency of Floods of Ungaged Streams in Minnesota,* USGS Water Resources Investigations Report 84–4170 (Washington, DC: U.S. Geological Survey, 1988); D.L. Lorenz, *et al., Techniques for Estimating the Magnitude and Frequency of Peak Flows on Small Streams in Minnesota Based on Data through Water Year 2005,* U.S. Geological Survey Scientific Investigations Report 2009–5250 (Reston, VA: U.S. Geological Survey, 2010)). Similar to wetlands, ponds are often used by invertebrate, reptile, and amphibian species that also utilized downstream waters for various life history requirements, particularly because many ponds, particularly temporary ponds, are free of predators, such as fish, that prey on larvae. The American toad and Eastern newt are widespread habitat generalists that can move among streams, wetlands, and ponds to take advantage of each aquatic habitat, feeding on aquatic invertebrate prey, and avoiding predators. *See,* e.g., *Id.* at 5–33 (citing K.J. Babbitt *et al.,* "Patterns of Larval Amphibian Distribution along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 81:1539–1552 (2003); D.M. Green, "*Bufo americanus,* American Toad," *in* M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species,* (Berkeley, CA: University of California Press, 2005), pp. 692–704; T.W. Hunsinger and M.J. Lannoo, "*Notophthalmus viridescens,* Eastern Newt," *in* M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species,* (Berkeley, CA: University of California Press, 2005), pp. 912–914; J.W. Petranka and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404–411 (2006)). Additionally, stream networks that are not part of the tributary system (*e.g.,* streams in closed basins without an (a)(1) through (a)(3) water or losing streams and other streams that cease to flow before reaching downstream (a)(1) through (a)(3) waters) may likewise have a significant impact on the chemical, physical, or biological integrity of downstream waters. Non-tributary streams may be connected via groundwater to downstream waters. Such streams may also provide habitat to insect, amphibian, and reptile species that also use the tributary network.

i. Additional Request for Public Comment on "Other Waters"

The agencies are considering whether to determine by rule that prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools, and perhaps other categories of waters, either alone or in combination with "other waters" of the same type in a single point of entry watershed have a significant nexus and are jurisdictional. R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003); M.G. Forbes, et al., "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," Wetlands 32(4): 705–715 (2012). These waters would not require a case-by-case analysis. At the same time, the agencies could determine by rule that playa lakes, and perhaps other categories of waters, do not have a significant nexus and are not jurisdictional. These waters would not be subject to a case-by-case analysis of significant nexus. As the science develops, the agencies may determine that additional categories of "other waters" have a significant nexus and are thus categorically jurisdictional. The specific categories of "other waters" for which there is currently evidence of a significant nexus are discussed below:

a. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, that are found in the central United States and Canada. Report at 5–57. The vast area they occupy is variable in many aspects, including climatically, topographically, geologically, and in terms of land use and alteration, which imparts variation on the potholes themselves. Prairie potholes demonstrate a wide range of hydrologic permanence, from holding permanent standing water to wetting only in years with high precipitation, which in turn influences the diversity and structure of their biological communities. Owing in large part to their spatial and temporal variability, individual prairie potholes span the entire continuum of connectivity to and isolation from the river network and other bodies of water. Potholes generally accumulate and retain water effectively due to the low permeability of their underlying soil, which can modulate flow characteristics of nearby streams and rivers. Potholes also can accumulate chemicals in overland flow, thereby reducing chemical loading to other bodies of water. When potholes are artificially connected to streams and lakes through drainage, isolation is eliminated and they become sources of water and chemicals. Potholes also support a community of highly mobile organisms, from plants to invertebrates that move among potholes and that can biologically connect the entire complex to the river network. Based on these connections and the strength of their effects, individually or in combination with other prairie potholes in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that prairie potholes have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

b. Carolina and Delmarva bays are ponded depressional wetlands that occur along the Atlantic coastal plain from northern Florida to New Jersey. *Id.* at 5–49. Most bays receive water through precipitation, lose water through evapotranspiration, and lack natural surface outlets. Both mineral-based and peat-based bays have shown connections to shallow groundwater. Bays typically are in proximity to each other or to open waters, providing the potential for surface water connections in large rain events via overland flow. Fish are reported in bays that are known to dry out, indirectly demonstrating surficial connections. Amphibians and reptiles use bays extensively for breeding and for rearing young. These animals can disperse many meters on the landscape and can colonize, or serve as a food source to, downstream waters. Similarly, bays foster abundant insects that have the potential to become part of the downstream food chain. Humans have ditched and channelized a high percentage of bays, creating new surface connections to "other waters" and allowing

transfer of nutrients, sediment, and other pollutants such as methylmercury. Based on these connections and the strength of their effects, individually or in combination with other Carolina or Delmarva bays in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that Carolina and Delmarva bays have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

c. Vernal pools are shallow, seasonal wetlands that accumulate water during colder, wetter months and gradually dry up during warmer, drier months. *Id.* at 5–66. Western vernal pools are seasonal wetlands associated with topographic depressions, soils with poor drainage, mild, wet winters and hot, dry summers in western North America from southeastern Oregon to northern Baja California, Mexico (*Id.* at 5–67, citing E.T. Bauder and S. McMillan, "Current Distribution and Historical Extent of Vernal Pools in Southern California and Northern Baja California, Mexico," pp. 56–70 in C.W. Witham, *et al.*, editors, *Ecology, Conservation, and Management,* 1998). Because their hydrology and ecology are so tightly coupled with the local and regional geological processes that formed them, western vernal pools typically occur within "vernal pool landscapes," or complexes of pools in which swales connect pools to each other and to seasonal streams (*Id.* at 5–67 to 5–68, citing W.A. Weitkamp, *et al.*, "Pedogenesis of a Vernal Pool Entisol-Alfisol-Vertisol Catena in Southern California," *Soil Science Society of America Journal* 60:316323 (1996); D.W. Smith and W.L. Verrill, "Vernal Pool-Soil-Landform Relationships in the Central Valley, California," pp. 15–23 in C.W. Witham, *et al.*, editors, *Ecology, Conservation, and Management of Vernal Pool Ecosystems—Proceedings from a 1996 Conference* (California Native Plant Society, Sacramento, CA,1998); M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2008)). Despite differences in geology, climate, and biological communities, some common findings about the hydrologic connectivity of vernal pools in different regions, including Western vernal pools, include evidence for temporary or permanent outlets, frequent filling and spilling of higher pools into lower elevation swales and stream channels, and conditions supporting subsurface flows through pools without perched aquifers to nearby streams. Non glaciated vernal pools in western states are reservoirs of biodiversity and can be connected genetically to other locations and aquatic habitats through wind- and animal mediated dispersal. Based on these connections and the strength of their effects, individually or in combination with other western vernal pools in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that western vernal pools have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information. The jurisdictional status of vernal pools located in other areas will be determined on a case-by-case significant nexus analysis with any similar situated waters in the single point of entry watershed. For example, insects and amphibians that can live in streams or permanent pools opportunistically use glaciated vernal pools in the Northeast and Midwest as alternative breeding habitat, refuge from predators or environmental stressors, hunting or foraging habitat, or stepping-stone corridors for dispersal and migration.

d. The word pocosin comes from the Algonquin Native American word for "swamp on a hill," and these evergreen shrub and tree dominated landscapes are found from Virginia to northern Florida, but mainly in North Carolina. (C.J. Richardson, "Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape?," *Wetlands* 23(3):563–576 (2003)). Usually, there is no standing water present in these peat-accumulating wetlands, but a shallow water table leaves the soil saturated for much of the year. They range in size from less than an acre to several thousand acres. The slow movement of water through the dense organic matter in pocosins removes excess nutrients deposited by rainwater. The same organic matter also acidifies the water. This pure water is slowly released to downstream waters and estuaries, where it helps to maintain the proper salinity, nutrients, and acidity. (*Id.*) Because pocosins are the topographic high areas on the regional landscape, they serve as the source of water for downstream areas. Pocosins often have seasonal connections to drainageways leading to estuaries or are contiguous with other wetlands draining into perennial streams or estuaries. (R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Other pocosins have been ditched and are directly connected to streams. (*Id.*) The draining of pocosins and decreased salinity in estuaries may be having a negative effect on brown shrimp in North Carolina. (*Id.*) Based on these connections and the strength of their effects, individually or in combination with other pocosins in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule pocosins have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

e. Along the Gulf of Mexico from western Louisiana to south Texas, freshwater wetlands occur as a mosaic of depressions, ridges, intermound flats, and mima mounds. (M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4): 705–715 (2012)). These coastal prairie wetlands were formed thousands of years ago by ancient rivers and bayous and once occupied almost a third of the landscape around Galveston Bay, Texas. Texas coastal prairie wetlands are locally abundant and in close proximity to other coastal prairie wetlands and function together cumulatively. (N. Enwright, *et al.*, "Using Geographic Information Systems (GIS) to Inventory Coastal Prairie Wetlands Along the Upper Gulf Coast, Texas," *Wetlands* 31:687–697 (2011)). Collectively as a complex, Texas coastal prairie wetlands may be geographically and hydrologically connected to each other via swales and connected to downstream waters, contributing flow to those downstream waters. (B.P. Wilcox, et al., "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31(3):451–458 (2011)). Cumulatively, these wetlands can control nutrient release levels and rates to downstream waters, as they capture, store, transform and pulse releases of nutrients to those waters. (M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4): 705–715 (2012)). Based on these connections and the strength of their effects, individually or in combination with other coastal prairie wetlands in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule Texas coastal prairie wetlands have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

The agencies could also conclude that playa lakes in the Great Plains even in combination with other playa lakes in a single point of entry watershed always lack a significant nexus and therefore are not jurisdictional. Playa lakes are round, shallow wetlands found primarily in the High Plains, a subregion of the Great Plains in the western and Midwestern United States. (D.A. Haukos, and L.M. Smith, "Past and Future Impacts of Wetland Regulations on Playas," *Wetlands* 23(3):577–589 (2003); R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Each playa typically occurs within a closed or terminal watershed, where all water in the watershed drains to the playa. (D.A. Haukos, and L.M. Smith, "Past and Future Impacts of Wetland Regulations on Playas," *Wetlands* 23(3):577–589 (2003)). As such, playas typically do not drain to an (a)(1) through (a)(3) water. Most playas are fed by precipitation and associated runoff, though a few are fed by groundwater. (R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Most playas fill with water only after spring rainstorms when freshwater collects in the round depressions of the otherwise flat landscape of west Texas, Oklahoma, New Mexico, Colorado, and Kansas. Although playas play a role in groundwater recharge of the Ogallala Aquifer, in local floodwater storage, and in provision of wildlife habitat, available scientific literature indicates that their chemical, physical, or biological connections to and effects on (a)(1) through (a)(3) waters are of a limited and tenuous nature.

The agencies seek comment, data, and information on whether there are

subcategories of "other waters" or specific combinations of characteristics that are "likely, in the majority of cases, to perform important functions for an aquatic ecosystem incorporating navigable waters," and, thus, should be *per se* jurisdictional. For example, if there are additional studies addressing the connectivity of prairie potholes in the Red River Valley, including the factors influencing that connectivity and how it is important to particular downstream waters, that would be relevant information.

Appendix B

Legal Analysis

Background

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, (33 U.S.C. 1251 et seq.) (Clean Water Act or CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[9] The U.S. Supreme Court first addressed the scope of "waters of the United States" protected by the CWA in *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation's waters "incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 132–33 (*citing* Senate Report 92–414).

The issue of CWA jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC,* the Court (in a 5–4 opinion) held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. The *SWANCC* Court noted that in *Riverside* it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up' with the 'waters of the United States' " and that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167. *SWANCC* did not invalidate (a)(3) or other parts of the regulatory definition of "waters of the United States."

Five years after *SWANCC,* the Court again addressed the CWA term "waters of the United States" in *Rapanos* v. *United States,* 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . . ," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id.* at 732 n.5 (*emphasis in original*). Justice Kennedy's concurring opinion took a different approach. Justice Kennedy concluded that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (*citing SWANCC,* 531 U.S. at 167, 172). He concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " 547 U.S. at 780. Justice Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* at 780. In *Rapanos,* the four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinions invalidated any of the regulatory provisions defining "waters of the United States."

The Circuit Courts of Appeals are not uniform as to the controlling standard for "waters of the United States" under *Rapanos.* The First, Third and Eighth Circuits have concluded that CWA jurisdiction exists if either Justice Kennedy's standard or the plurality's standard is met. *United States* v. *Johnson,* 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied,* 552 U.S. 948 (2007); *U.S.* v. *Donovan,* 661 F.3d. 174, 176 (3rd Cir. 2011), *cert. denied,* 132 S.Ct. 2409 (2012); *U.S.* v. *Bailey,* 571 F.3d 791, 798–99 (8th Cir. 2009). The Seventh and Ninth Circuits limited their holdings that the Kennedy standard applied to the facts of the cases before them, and did not foreclose the possibility that in some cases the plurality's standard might apply. *N. Cal. River Watch* v. *City of Healdsburg,* 496 F.3d 993, 999–1000 (9th Cir. 2007), *cert. denied,* 552 U.S. 1180 (2008); *United States* v. *Gerke Excavating, Inc.,* 464 F.3d 723, 725 (7th Cir. 2006), *cert. denied,* 552 U.S. 810 (2007). The Fifth and Sixth Circuits did not choose a controlling standard because the waters at issue satisfied both standards. *United States* v. *Lucas,* 516 F.3d 316, 326–27 (5th Cir. 2008), *cert. denied,* 555 U.S. 822 (2008); *United States* v. *Cundiff,* 555 F.3d 200, 210–13 (6th Cir. 2009), *cert. denied,* 558 U.S. 818 (2009). The Eleventh Circuit has held that only the Kennedy standard determines jurisdiction. *United States* v. *Robison,* 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom United States* v. *McWane* and *McWane* v. *United States,* 555 U.S. 1045 (2008). No Circuit Court has held that only the plurality standard applies.

Traditional Navigable Waters

EPA and the Corps are proposing no changes to the existing regulation related to traditional navigable waters and at paragraph (a)(1) will continue to assert jurisdiction over all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See e.g.,* 33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1); 40 CFR 122.2 ("waters of the U.S."). Those "(a)(1) waters" are the "traditional navigable waters." Those (a)(1) waters include all of the waters defined in 33 CFR part 329, which implements sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the Federal courts, plus all other waters that are navigable in fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

To determine whether a water body constitutes an (a)(1) water under the regulations, relevant considerations include Corps regulations, prior determinations by the Corps and by the Federal courts, and case law. Corps districts and EPA regions would determine whether a particular water body is a traditional navigable water based on application of those considerations to the specific facts in each case.

As noted above, the (a)(1) waters include, but are not limited to, waters that meet any of the tests set forth in 33 CFR part 329 (*e.g.,* the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce). The Corps districts have made determinations in the past under these regulations for purposes of asserting jurisdiction under sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 and 403). Pursuant to 33 CFR 329.16, the Corps maintains lists of final determinations of navigability for purposes of Corps jurisdiction under the Rivers and Harbors Act of 1899. While absence from the list should not be taken as an indication that the water is not navigable (§ 329.16(b)), Corps districts and EPA Regions rely on any final Corps

[9] The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA enacted in 1977 acknowledged the popular name of the statute as the Clean Water Act. See Public Law 95–217, 91 Stat. 1566; 33 U.S.C. 1251 note.

determination that a water body meets any of the tests set forth in part 329.

If the Federal courts have determined that a water body is navigable-in-fact under Federal law for any purpose, that water body qualifies as a "traditional navigable water" subject to CWA jurisdiction under 33 CFR 328.3(a)(1) and 40 CFR 230.3(s)(1). Corps districts and EPA regions are guided by the relevant opinions of the Federal courts in determining whether such water bodies are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" (33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1)) or "navigable-in-fact."

The definition of "navigable-in-fact" derives from a long line of cases originating with *The Daniel Ball*, 77 U.S. 557 (1870). The Supreme Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. at 563.

In *The Montello*, the Supreme Court clarified that "customary modes of trade and travel on water" encompasses more than just navigation by larger vessels:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 87 U.S. 430, 441–42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water's capacity for navigation alone is not sufficient; that capacity must be indicative of the water's being "generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442.

In *Economy Light & Power*, the Supreme Court held that a waterway need not be continuously navigable; it is navigable even if it has "occasional natural obstructions or portages" and even if it is not navigable "at all seasons . . . or at all stages of the water." *Economy Light & Power Co.* v. *U.S.*, 256 U.S. 113, 122 (1921).

In *United States* v. *Holt State Bank*, 270 U.S. 49 (1926), the Supreme Court summarized the law on navigability as of 1926 as follows:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

Holt State Bank, 270 U.S. at 56.

In *U.S.* v. *Utah*, 283 U.S. 64 (1931) and *U.S.* v. *Appalachian Elec. Power Co*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose. *U.S.* v. *Utah*, at 81–83 ("The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question."); *U.S.* v. *Appalachian Elec. Power Co.*, 311 U.S. at 416 ("Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.") *Appalachian Power* further held that a water is navigable-in-fact even if it is not navigable and never has been but may become so by reasonable improvements. 311 U.S. at 407–08.

In 1971, in *Utah* v. *United States*, 403 U.S. 9 (1971), the Supreme Court held that the Great Salt Lake, an intrastate water body, was navigable under Federal law even though it "is not part of a navigable interstate or international commercial highway." *Id.* at 10. In doing so, the Supreme Court stated that the fact that the Lake was used for hauling of animals by ranchers rather than for the transportation of "water borne freight" was an "irrelevant detail." *Id.* at 11. "The lake was used as a highway and that is the gist of the federal test." *Id.*

Most recently, the Supreme Court explained:

> The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. See, *e.g.*, *ibid.*; *The Montello*, 20 Wall. 430, 439, 22 L.Ed. 391 (1874); *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 406, and n. 21, 61 S.Ct. 291, 85 L.Ed. 243 (1940) (Federal Power Act); *Rapanos* v. *United States*, 547 U.S. 715, 730–731, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion) (Clean Water Act); *id.*, at 761, 126 S.Ct. 2208 (KENNEDY, J., concurring in judgment) (same). It has been used as well to determine questions of title to water beds under the equal-footing doctrine. See *Utah*, *supra*, at 76, 51 S.Ct. 438; *Oklahoma* v. *Texas*, 258 U.S. 574, 586, 42 S.Ct. 406, 66 L.Ed. 771 (1922); *Holt State Bank*, *supra*, at 56, 46 S.Ct. 197. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases. Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, see *Utah*, *supra*, at 75, 51 S.Ct. 438, and based on the "natural and ordinary condition" of the water, see *Oklahoma*, *supra*, at 591, 42 S.Ct. 406. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so, see, *e.g.*, *Ex parte Boyer*, 109 U.S. 629, 631–632, 3 S.Ct. 434, 27 L.Ed. 1056 (1884) (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, see, *e.g.*, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634–635, 32 S.Ct. 340, 56 L.Ed. 570 (1912), were once navigable but are no longer, see *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 123–124, 41 S.Ct. 409, 65 L.Ed. 847 (1921), or are not navigable and never have been but may become so by reasonable improvements, see *Appalachian Elec. Power Co.*, *supra*, at 407–408, 61 S.Ct. 291. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. See *The Daniel Ball*, 1229*1229 *supra*, at 564. And, of course, the commerce power extends beyond navigation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173–174, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See *Utah*, *supra*, at 76, 51 S.Ct. 438. This list of differences is not exhaustive. Indeed, "[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration." *Appalachian Elec. Power Co.*, *supra*, at 406, 61 S.Ct. 291.

PPL Montana v. *Montana*, 565 U.S. (2012).

Also of note are two decisions from the courts of appeals. In *FPL Energy Marine Hydro*, a case involving the Federal Power Act, the D.C. Circuit reiterated the fact that "*actual use* is not necessary for a navigability determination" and repeated earlier Supreme Court holdings that navigability and capacity of a water to carry commerce could be shown through "physical characteristics and experimentation." *FPL Energy Marine Hydro LLC* v. *FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002). In that case, the D.C. Circuit upheld a FERC navigability determination that was based upon three experimental canoe trips taken specifically to demonstrate the river's navigability. *Id.* at 1158–59.

The 9th Circuit has also implemented the Supreme Court's holding that a water need only be susceptible to being used for waterborne commerce to be navigable-in-fact. *Alaska* v. *Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989). In *Ahtna*, the 9th Circuit held that current use of an Alaskan river for commercial recreational boating was sufficient evidence of the water's capacity to carry waterborne commerce at the time that Alaska became a state. *Id.* at 1405. It was found to be irrelevant whether or not the river was actually being navigated or being used for commerce at the time, because current navigation showed that the river always had the capacity to support such navigation. *Id.* at 1404.

In summary, when determining whether a water body qualifies as a "traditional navigable water" (*i.e.*, an (a)(1) water), relevant considerations include whether the water body meets any of the tests set forth in Part 329, or a Federal court has determined that the water body is

"navigable-in-fact" under Federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the Federal courts.

Interstate Waters

1. Interstate Waters

The agencies' proposal today makes no change to the interstate waters section of the existing regulations and the agencies would continue to assert jurisdiction over interstate waters, including interstate wetlands. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation.

A. The Language of the Clean Water Act, the Statute as a Whole, and the Statutory History Demonstrate Congress' Clear Intent To Include Interstate Waters as "Navigable Waters" Subject to the Clean Water Act

While as a general matter, the scope of the terms "navigable waters" and "waters of the United States" is ambiguous, the language of the CWA, particularly when read as a whole, demonstrates that Congress clearly intended to continue to subject interstate waters to Federal regulation. The statutory history of Federal water pollution control places the terms of the CWA in context and provides further evidence of Congressional intent to include interstate waters within the scope of the "navigable waters" protected by the Act. Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of Federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of Federal regulation under the Commerce Clause.[10] The CWA itself is clear that interstate waters that were previously subject to Federal regulation remain subject to Federal regulation. The text of the CWA, specifically the CWA's provision with respect to interstate waters and their water quality standards, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent. Thus, interstate waters are "navigable waters" protected by the CWA.

(1) The Plain Language of the Clean Water Act and the Statute as a Whole Clearly Indicate Congress' Intent to Include Interstate Waters Within the Scope of "Navigable Waters" for Purposes of the Clean Water Act

Under well settled principles, the phrase "navigable waters" should not be read in isolation from the remainder of the statute. As the Supreme Court has explained:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. *U.S. Postal Service,* 546 U.S. 481, 486 (2006); *see also United States Nat'l. Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993).

While the term "navigable waters" is, in general, ambiguous, interstate waters are waters that are clearly covered by the plain language of the definition of "navigable waters."[11] Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." Interstate waters are waters of the several States and, thus, the United States. While the 1972 Act was clearly not limited to interstate waters, it was clearly intended to include interstate waters.

Furthermore, the CWA does not simply define "navigable waters." Other provisions of the statute provide additional textual evidence of the scope of this term of the Act. Most importantly, there is a specific provision in the 1972 CWA establishing requirements for those interstate waters which were subject to the prior Water Pollution Control Acts.

The CWA requires states to establish water quality standards for navigable waters and submit them to the Administrator for review.[12] Under section 303(a) of the Act, *in order to carry out the purpose of this Act,* any water quality standard applicable to *interstate waters* which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, *shall remain in effect* unless the Administrator determined that such standard is not consistent with the applicable requirements of the Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b). CWA section 303(a)(1) (*emphasis added*).

Under the 1965 Act, as discussed in more detail below, states were directed to develop water quality standards establishing water quality goals for interstate waters. By the early 1970s, all the states had adopted such water quality standards. Advanced Notice of Proposed Rulemaking, Water Quality Standards Regulation, 63 FR 36742, 36745, July 7, 1998. In section 303(a), Congress clearly intended for existing Federal regulation of interstate waters to continue under the amended CWA. Water quality standards for interstate waters were not merely to remain in effect, but EPA was required to actively assess those water quality standards and even promulgate revised standards for interstate waters if states did not make necessary changes. By the plain language of the statute, these water quality standards for interstate waters were to remain in effect "in order to carry out the purpose of this Act." The objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a). It would contravene Congress' clearly stated intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, state boundaries ("interstate waters" as defined by the 1948 Act, § 10, 62 Stat. 1161), such that interstate waters that were previously protected were no longer protected because they lacked a connection to a water that is navigable for purposes of Federal regulation under the Commerce Clause. Nor would all the existing water quality standards be "carry[ing] out the purpose of this Act," if the only water quality standards that could be implemented through the Act (through, for example, National Pollutant Discharge Elimination System permits under section 402) were those water quality standards established for interstate waters that are also waters that are navigable for purposes of Federal regulation under the Commerce Clause or that connect to waters that are navigable for purposes of Federal regulation under the Commerce Clause. Nowhere in section 303(a) does Congress make such a distinction.

(2) The Federal Water Pollution Control Statute That Became the Clean Water Act Covered Interstate Waters

In 1972, when Congress rewrote the law governing water pollution, two Federal statutes addressed discharges of pollutants into interstate waters and water that is

[10] For purposes of the CWA, EPA and the Corps have interpreted the term "traditional navigable waters" to include all of the "navigable waters of the United States," defined in 33 CFR part 329 and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN). This section explains why EPA and the Corps do not interpret the CWA or the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC)* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) and *Rapanos* v. *United States,* 547 U.S. 715 (2006), to restrict CWA jurisdiction over interstate waters to only those interstate waters that are traditional navigable waters or that connect to traditional navigable waters.

[11] The Supreme Court has found that the term "waters of the United States" is ambiguous in some respects. *Rapanos,* 547 U.S. at 752 (plurality opinion), 804 (dissent).

[12] Section 303 of the Act requires the states to submit revised and new water quality standards to the Administrator for review. CWA section 303(c)(2)(A). Such revised or new water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters." *Id.* If the Administrator determines that a revised or new standard is not consistent with the Act's requirements, or determines that a revised or new standard is necessary to meet the Act's requirements, and the state does not make required changes, "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved." CWA section 303(c)(4).

navigable for purposes of Federal regulation under the Commerce Clause, and tributaries of each: The Water Pollution Control Act of 1948, as amended, and section 13 of the Rivers and Harbors Act of 1899 (known as the "Refuse Act"). Of the two, the Water Pollution Control Act extended Federal authority over interstate waters and their tributaries. In contrast, the Refuse Act extended Federal jurisdiction over the "navigable waters of the United States" and their tributaries. These two separate statutes demonstrate that Congress recognized that interstate waters and "navigable waters of the United States" were independent lawful bases of Federal jurisdiction.

a. The Federal Water Pollution Control Act Prior to 1972

From the outset, and through all the amendments pre-dating the 1972 Amendments, the Federal authority to abate water pollution under the Water Pollution Control Act, and the Federal Water Pollution Control Act (FWPCA) as it was renamed in 1956, extended to interstate waters. In addition, since first enacted in 1948, and throughout all the amendments, the goals of the Act have been, inter alia, to protect public water supplies, propagation of fish and aquatic life, recreation, agricultural, industrial, and other legitimate uses. *See* 62 Stat. 1155 and 33 U.S.C. 466 (1952), 33 U.S.C. 466 (1958), 33 U.S.C. 466 (1964), 33 U.S.C. 1151 (1970).

In 1948, Congress enacted the Water Pollution Control Act in connection with the exercise of jurisdiction over the waterways of the Nation and in the consequence of the benefits to public health and welfare by the abatement of stream pollution. *See* Pub. L. No. 80–845, 62 Stat. 1155 (June 30, 1948). The Act authorized technical assistance and financial aid to states for stream pollution abatement programs, and made discharges of pollutants into interstate waters and their tributaries a nuisance, subject to abatement and prosecution by the United States. *See* section 2(d)(1),(4), 62 Stat. at 1156–1157 (section 2(d)(1) of the Water Pollution Control Act of 1948, 62 Stat. at 1156, stated that the "pollution of *interstate waters"* in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act. (emphasis added)); § 2(a), 62 Stat. 1155 (requiring comprehensive programs for "interstate waters and tributaries thereof"); § 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into "interstate waters or into a tributary of such waters"). Under the statute, "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Section 10, 62 Stat. 1161.

In 1956, Congress strengthened measures for controlling pollution of interstate waters and their tributaries. Public Law 84–660, 70 Stat. 498 (1956) (directing further cooperation between the Federal and State Governments in development of comprehensive programs for eliminating or reducing "the pollution of interstate waters and tributaries" and improving the sanitary condition of surface and underground waters, and authorizing the Surgeon General to make joint investigations with States into the conditions of and discharges into "any waters of any State or States.").

In 1961, Congress amended the FWPCA to substitute the term "interstate or navigable waters" for "interstate waters." *See* Public Law 87–88, 75 Stat. 208 (1961). Accordingly, beginning in 1961, the provisions of the FWPCA applied to all interstate waters and navigable waters and the tributaries of each, *see* 33 U.S.C. 466a, 466g(a) (1964).[13]

In 1965, Congress approved a second set of major legislative changes, requiring each state to develop water quality standards for interstate waters within its boundaries by 1967. Public Law 89–234, 79 Stat. 908 (1965).[14] Failing establishment of adequate standards by the state, the Act authorized establishment of water quality standards by Federal regulation. *Id.* at 908. The 1965 Amendments provided that the discharge of matter "into such interstate waters or portions thereof," which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement through procedures specified in the Act, including (after conferences and negotiations and consideration by a Hearing Board) legal action in the courts. *Id.* at 909.[15]

b. The Refuse Act

Since its original enactment in 1899, the Refuse Act has prohibited the discharge of refuse matter "into any navigable water of the United States, or into any tributary of any navigable water." Ch. 425, 30 Stat. 1152 (1899). It also has prohibited the discharge of such material on the bank of any tributary where it is liable to be washed into a navigable water. *Id.* Violators are subject to fines and imprisonment. *Id.* at 1153 (codified at 33 U.S.C. 412). In 1966, the Supreme Court upheld the Corps' interpretation of the Refuse Act as prohibiting discharges that pollute the navigable waters, and not just those discharges that obstruct navigation. *United States* v. *Standard Oil Co.,* 384 U.S. 224, 230 (1966). In 1970, President Nixon signed an Executive Order directing the Corps (in consultation with the Federal Water Pollution Control Administration [16]) to implement a permit program under section 13 of the RHA "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks." E.O. 11574, 35 FR 19627, Dec. 25, 1970. In 1971, the Corps promulgated regulations establishing the Refuse Act Permit Program. 36 FR 6564, 6565, April 7, 1971. The regulations made it unlawful to discharge any pollutant (except those flowing from streets and sewers in a liquid state) into a navigable waterway or tributary, except pursuant to a permit. Under the permit program, EPA advised the Corps regarding the consistency of a proposed discharge with water quality standards and considerations, and the Corps evaluated a permit application for impacts on anchorage, navigation, and fish and wildlife resources. *Id.* at 6566.

c. The Federal Water Pollution Control Act Amendments of 1972

When Congress passed the Federal Water Pollution Control Act Amendments of 1972 (referred to hereinafter as the CWA or CWA), it was not acting on a blank slate. It was amending existing law that provided for a Federal/State program to address water pollution. The Supreme Court has recognized that Congress, in enacting the CWA in 1972, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview Homes,* 474 U.S. at 133; *see also International Paper Co.* v. *Ouellette,* 479 U.S. 481, 486, n.6 (1987).

The amendments of 1972 defined the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). While earlier versions of the 1972 legislation defined the term to mean "the navigable waters of the United States," the Conference Committee deleted the word "navigable" and expressed the intent to reject prior geographic limits on the scope of Federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas"); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries."). Thus, Congress intended the scope of the 1972 Act to include, at a

[13] Congress did not define the term "navigable waters" in the 1961 Amendments, or in subsequent FWPCA Amendments, until 1972.

[14] In 1967, the state of Arizona created the Water Quality Control Council (Council) to implement the requirements of the 1965 FWPCA. The Council adopted water quality standards for those waters that were considered "interstate waters" pursuant to the existing Federal law. The Council identified the Santa Cruz River as an interstate water and promulgated water quality standards for the river in accordance with Federal law.

[15] The 1966 Amendments authorized civil fines for failing to provide information about an alleged discharge causing or contributing to water pollution. Public Law 89–753, 80 Stat. 1250 (1966); *see also* S. Rep. No. 414, 92d Congress, 1st Sess. 10 (1972) (describing the history of the FWPCA).

[16] In December 1970, administration of the Federal Water Pollution Control Administration was transferred from the Secretary of the Interior to EPA. S. Rep. No. 414, 92d Congress, 1st Sess. (1972).

minimum, the waters already subject to Federal water pollution control law—both interstate waters and waters that are navigable for purposes of Federal regulation under the Commerce Clause. Those statutes covered interstate waters, defined interstate waters without requiring that they be a traditional navigable water or be connected to water that is a traditional navigable water, and demonstrated that Congress knew that there are interstate waters that are not navigable for purposes of Federal regulation under the Commerce Clause.

In fact, Congress amended the Federal Water Pollution Control Act in 1961 to substitute the term "interstate or navigable waters" for "interstate waters," demonstrating that Congress wanted to be very clear that it was asserting jurisdiction over both types of waters: interstate waters even if they were not navigable for purposes of Federal regulation under the Commerce Clause, and traditional navigable waters even if they were not interstate waters. At no point were the interstate waters already subject to Federal water pollution control authority required to be navigable or to connect to a traditional navigable water. Further, as discussed above, the legislative history clearly demonstrates that Congress was expanding jurisdiction—not narrowing it—with the 1972 amendments. Thus, it is reasonable to conclude that by defining "navigable waters" as "the waters of the United States" in the 1972 amendments, Congress included not just traditionally navigable waters, but all waters previously regulated under the Federal Water Pollution Control Act, including non-navigable interstate waters.

Based on the statutory definition of navigable waters, the requirement of section 303(a) for water quality standards for interstate waters to remain in effect, the purposes of the Act, and the more than three decades of Federal water pollution control regulation that provides a context for reading those provisions of the statute, the intent of Congress is clear that the term "navigable waters" includes "interstate waters" as an independent basis for CWA jurisdiction, whether or not they themselves are traditional navigable waters or are connected to a traditional navigable water.

B. Supreme Court Precedent Supports CWA Jurisdiction Over Interstate Waters Without Respect to Navigability

In two seminal decisions, the Supreme Court established that resolving interstate water pollution issues was a matter of Federal law and that the CWA was the comprehensive regulatory scheme for addressing interstate water pollution. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972); *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981). In both of these decisions, the Court held that Federal law applied to interstate waters. Moreover, these cases analyzed the applicable Federal statutory schemes and determined that the provisions of the Federal Water Pollution Control Act and the CWA regulating water pollution applied generally to interstate waters. The holdings of these cases recognized the Federal interest in interstate water quality pollution; and *City of Milwaukee* recognized that CWA jurisdiction extends to interstate waters without regard to navigability.

In *Illinois* v. *Milwaukee,* the Court considered a public nuisance claim brought by the State of Illinois against the city of Milwaukee to address the adverse effects of Milwaukee's discharges of poorly treated sewage into Lake Michigan, "a body of interstate water." 406 U.S. at 93. In relevant part, the Court held that the Federal common law of nuisance was an appropriate mechanism to resolve disputes involving interstate water pollution. 406 U.S. at 107 ("federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution"). The Court further noted that in such actions the Court could consider a state's interest in protecting its high water quality standards from "the more degrading standards of a neighbor." *Id.*

In reaching this conclusion, the Court examined in detail the scope of the Federal regulatory scheme as it existed prior to the October, 1972 FWPCA amendments. In its April, 1972 decision, the Court concluded that the Federal Water Pollution Control Act "makes clear that it is federal, not state, law that in the end controls the pollution of *interstate or navigable waters.*" 406 U.S. at 102 (*emphasis added*). The Court, in this case, concluded that the regulatory provisions of the Federal Water Pollution Control Act did not address the right of a state to file suit to protect water quality. However, this was not because this statute did not reach interstate waters. The Court specifically noted that section 10(a) of the Federal Water Pollution Control Act "makes pollution of *interstate or navigable waters* subject 'to abatement' " 406 U.S. at 102 (*emphasis added*). Rather, the Court noted that the plaintiff in this action was seeking relief outside the scope of the Federal Water Pollution Control Act and that statute explicitly provided that independent "state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action." 406 U.S. at 104 (*citing* section 10(b) of the Federal Water Pollution Control Act).

In addition, in *Illinois* v. *Milwaukee,* the Court acknowledged that it was essential for Federal law to resolve interstate water pollution disputes, citing with approval the following discussion from *Texas* v. *Pankey:*

> Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

406 U.S. at 107 n. 9, *citing Texas* v. *Pankey,* 441 F.2d 236, 241–242.

In *City of Milwaukee,* the Court revisited this dispute and addressed the expanded statutory provisions of the CWA regulating water pollution. The scope of the CWA amendments led the Court to reverse its decision in *Illinois* v. *Milwaukee.* In reaching this result, the Court concluded that Congress had elected to exercise its authority under Federal law to occupy the field of water pollution regulation. As a result, the Court concluded that there was no basis for maintaining a Federal common law of nuisance.

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters". . . Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case.

451 U.S. at 317.

The Court's analysis in *Illinois* v. *Milwaukee* made clear that Federal common law was necessary to protect "the environmental rights of States against improper impairment by sources outside its domain." 406 U.S. at 107, n. 9. In the context of interstate water pollution, nothing in the Court's language or logic limits the reach of this conclusion to only navigable interstate waters. In *City of Milwaukee,* the Court found that the CWA was the "comprehensive regulatory program" that "occupied the field" (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution. Since the Federal common law of nuisance (as well as the statutory provisions regulating water pollution in the Federal Water Pollution Control Act) applied to interstate waters whether navigable or not, the CWA could only occupy the field of interstate water pollution if it too extended to non-navigable as well as navigable interstate waters.

With regard to the specifics of interstate water pollution, the *City of Milwaukee* Court noted that, in *Illinois* v. *Milwaukee,* it had been concerned that Illinois did not have a forum in which it could protect its interests in abating water pollution from out of state, absent the recognition of Federal common law remedies. 451 U.S. at 325. The Court then went on to analyze in detail the specific procedures created by the CWA "for a State affected by decisions of a neighboring State's permit-granting agency to seek redress." 451 U.S. at 326. The Court noted that "any State whose waters may be affected by the issuance of a permit" is to receive notice and the opportunity to comment on the permit. *Id.* (citing to CWA section 402(b)(3)(5). In addition the Court noted provisions giving EPA the authority to veto and issue its own permits "if a stalemate between an issuing and objecting state develops." *Id.* (citing to CWA sections 402(d)(2)(A),(4)). In light of these protections for states affected by interstate water pollution, the court concluded that

[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.

451 U.S. at 326.

Nothing in the language or the reasoning of this discussion limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected to navigable waters. If these protections only applied to navigable interstate waters, a downstream state would be unable to protect many of its waters from out of state water pollution. This would hardly constitute a comprehensive regulatory scheme that occupied the field of interstate water pollution.

For these reasons, the holdings and the reasoning of these decisions establish that the regulatory reach of the CWA extends to all interstate waters without regard to navigability.[17]

C. The Supreme Court's Decisions in SWANCC and Rapanos Do Not Limit or Constrain Clean Water Act Jurisdiction Over Non-Navigable Interstate Waters

As noted above, the Supreme Court recognized that Congress, in enacting the CWA, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview,* 474 U.S. at 133; *see also International Paper Co.* v. *Ouellette,* 479 U.S. 481, 486 n.6, (1987). In *Riverside Bayview,* and subsequently in *SWANCC* and *Rapanos,* the Court addressed the construction of the CWA terms "navigable waters" and "the waters of the United States." In none of these cases did the Supreme Court address interstate waters, nor did it overrule prior Supreme Court precedent which addressed the interaction between the CWA and Federal common law to address pollution of interstate waters. Therefore, the statute, even in light of *SWANCC* and *Rapanos,* does not impose an additional requirement that interstate waters must be water that is navigable for purposes of Federal regulation under the Commerce Clause or connected to water that is navigable for purposes of Federal regulation under the Commerce Clause to be jurisdictional waters for purposes of the CWA.

[17] Nothing in subsequent Supreme Court case law regarding interstate waters in any way conflicts with the agencies' interpretation. *See International Paper* v. *Ouellette,* 479 U.S. 481 (1987); *Arkansas* v. *Oklahoma,* 503 U.S. 91 (1992). In both of these cases, the Court detailed how the CWA had supplanted the Federal common law of nuisance to establish the controlling statutory scheme for addressing interstate water pollution disputes. Nothing in either decision limits the applicability of the CWA to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters.

At the outset, it is worth noting that neither *SWANCC* nor *Rapanos* dealt with the jurisdictional status of interstate waters. Repeatedly in the *SWANCC* decision the Court emphasized that the question presented concerned the jurisdiction status of nonnavigable *intrastate* waters located in two Illinois counties. *SWANCC* 531 U.S. at 165–166, 171 ("we thus decline to . . . hold that isolated ponds, some only seasonal, *wholly located within two Illinois counties* fall under § 404(a) definition of navigable waters . . .") (*emphasis added*). Nowhere in Justice Rehnquist's majority opinion in *SWANCC* does the Court discuss the Court's interstate water case law.[18] The Court does not even discuss the fact that CWA jurisdictional regulations identify interstate waters as regulated "waters of the United States." In fact, the repeated emphasis on the intrastate nature of the waters at issue can be read as an attempt to distinguish *SWANCC* from the Court's interstate water jurisprudence.

In *Rapanos,* the properties at issue were located entirely within the State of Michigan. 547 U.S. 715, 762–764. Thus, the Court had no occasion to address the text of the CWA with respect to interstate waters or the agencies' regulatory provisions concerning interstate waters. In addition, neither Justice Kennedy nor the plurality discusses the impact of their opinions on the Court's interstate waters jurisprudence. The plurality decision acknowledges that CWA jurisdictional regulations include interstate waters. 547 U.S. 715, 724. However, the plurality did not discuss in any detail its views as to the continued vitality of regulations concerning such waters.

Moreover, one of the analytical underpinnings of the *SWANCC* and *Rapanos* decisions is irrelevant to analysis of regulations asserting jurisdiction over interstate waters. In *SWANCC,* the Court declined to defer to agency regulations asserting jurisdiction over isolated waters because

[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . .This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority. . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

531 U.S. at 172–173 (citations omitted).

However, the Court's analysis in *Illinois* v. *Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create Federal law to resolve interstate water pollution disputes. As discussed above, the Court in *Illinois* v. *Milwaukee,* invited further Federal legislation to address interstate water pollution, and in so doing concluded that State law was not an appropriate basis for addressing interstate water pollution issues. 406 U.S. at 107 n. 9 (*citing Texas* v. *Pankey,* 441 F.2d 236, 241–242). In *City of Milwaukee,* the Court indicated that central to its holding in *Illinois* v. *Milwaukee* was its concern "that Illinois did not have any forum to protect its interests [in the matters involving interstate water pollution]." 451 U.S. 325. As discussed above, the Court cited with approval the statutory provisions of the CWA regulating water pollution as an appropriate means to address that concern.

[18] It is worth noting the Justice Rehnquist was also the author of *City of Milwaukee.*

The *City of Milwaukee* and *Illinois* v. *Milwaukee* decisions make clear that assertion of Federal authority to resolve disputes involving interstate waters does not alter "the Federal-State framework by permitting Federal encroachment on a traditional State power." 531 U.S. at 173. "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, have been recognized as presenting Federal questions." *Illinois* v. *Milwaukee,* 406 U.S. at 105 (internal quotations and citations omitted).

The Supreme Court's analysis in *SWANCC* and *Rapanos* materially altered the criteria for analyzing CWA jurisdictional issues for wholly *intrastate* waters. However, these decisions by their terms did not affect the body of case law developed to address interstate waters. The holdings in the Supreme Court's interstate waters jurisprudence, in particular *City of Milwaukee,* apply CWA jurisdiction to interstate waters without regard to, or discussion of, navigability. In *City of Milwaukee,* the Court held that the CWA provided a comprehensive statutory scheme for addressing the consequences of interstate water pollution. Based on this analysis, the Court *expressly* overruled its holding in *Illinois* v. *Milwaukee* that the Federal common law of nuisance would apply to resolving interstate water pollution disputes. Instead, the Court held that such disputes would now be resolved through application of the statutory provisions of the CWA regulating water pollution.

It would be unreasonable to interpret *SWANCC* or *Rapanos* as overruling *City of Milwaukee* with respect to CWA jurisdiction over non-navigable interstate waters. Such an interpretation would result in no law to apply to water pollution disputes with regard to such waters, unless one were to assume that the Court intended (without discussion or analysis) to restore the Federal common law of nuisance as the law to apply in such matters. Moreover, *SWANCC* and *Rapanos* acknowledge that CWA regulatory jurisdiction extends to at least some non-navigable waters. *See, e.g.,* 547 U.S. at 779 (Kennedy, J.). Neither the *SWANCC* Court nor the plurality or Kennedy opinions in *Rapanos* purports to set out the complete boundaries of CWA jurisdiction. *See, e.g.,* 547 U.S. at 731 ("[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.") (plurality opinion).

In addition, as the Supreme Court has repeatedly admonished, if a Supreme Court precedent has direct application in a case yet appears to rest on a rationale rejected in some other line of decisions, lower courts should follow the case which directly controls,

leaving to the Supreme Court the prerogative of overruling its precedents. *Agostino* v. *Felton,* 521 U.S. 203, 237 (1997); *United States* v. *Hatter,* 532 U.S. 557, 566–567 (1981). Moreover, when the Supreme Court overturns established precedent, it is explicit. *See, Lawrence* v. *Texas,* 539 U.S. 558, 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled.").

D. The Agencies' Longstanding Interpretation of the Term "Navigable Waters" To Include "Interstate Waters"

EPA, the agency charged with implementing the CWA, has always interpreted the 1972 Act to cover interstate waters. Final Rules, 38 FR 13528, May 22, 1973 (the term "waters of the United States" includes "interstate waters and their tributaries, including adjacent wetlands"). While the Corps of Engineers initially limited the scope of coverage for purposes of section 404 of the CWA to those waters that were subject to the Rivers and Harbors Act of 1899, after a lawsuit, the Corps amended its regulations to provide for the same definition of "waters of the United States" that EPA's regulations had always established. In 1975, the Corps' revised regulations defined "navigable waters" to include "[i]nterstate waters landward to their ordinary high water mark and up to their headwaters." In their final rules promulgated in 1977, the Corps adopted EPA's definition and included within the definition of "waters of the United States" "interstate waters and their tributaries, including adjacent wetlands." The preamble provided an explanation for the inclusion of interstate waters:

> The affects [sic] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.

Final Rules, 42 FR 37122, July 19, 1977.

The legislative history similarly provides support for the agencies' interpretation. Congress in 1972 concluded that the mechanism for controlling discharges and, thereby abating pollution, under the FWPCA and Refuse Act "has been inadequate in every vital aspect." S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1972). The Senate Committee on Public Works reported that development of water quality standards, assigned to the states under the 1965 FWPCA Amendments, "is lagging" and the "1948 abatement procedures, and the almost total lack of enforcement," prompted the search for "more direct avenues of action against water polluters and water pollution." *Id.* at 5. The Committee further concluded that although the Refuse Act permit program created in 1970 "seeks to establish this direct approach," it was too weak because it applied only to industrial polluters and too unwieldy because the authority over each permit application was divided between two Federal agencies. *See id.* at 5; *see also id.* at 70–72 (discussing inadequacies of Refuse Act program).

In light of the poor success of those programs, the Committee recommended a more direct and comprehensive approach which, after amendment in conference, was adopted in the 1972 Act. The text, legislative history and purpose of the 1972 Amendments all show an intent—through the revisions—to broaden, improve and strengthen, not to curtail, the Federal water pollution control program that had existed under the Refuse Act and FWPCA.[19] The 1972 FWPCA Amendments were "not merely another law 'touching interstate waters' " but were "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." [20]

As the legislative history of the 1972 Act confirms, Congress' use of the term "waters of the United States" was intended to repudiate earlier limits on the reach of Federal water pollution efforts: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." *See* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The House and Senate Committee Reports further elucidate the Conference Committee's rationale for removing the word "navigable" from the definition of "navigable waters," in 33 U.S.C. 1362(7). The Senate report stated:

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries.

See S. Rep. 414, 92d Cong., 1st Sess. 77 (1971); *see also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972) ("The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."). These passages strongly suggest that Congress intended to expand Federal protection of waters. There is no evidence that Congress intended to exclude interstate waters which were protected under Federal law if they were not water that is navigable for purposes of Federal regulation under the Commerce Clause or connected to water that is navigable for purposes of Federal regulation under the Commerce Clause. Such an exclusion would be contrary to all the stated goals of Congress in enacting the sweeping amendments which became the CWA.

The CWA was enacted in 1972. EPA's contemporaneous regulatory definition of "waters of the United States," promulgated in 1973, included interstate waters. The definition has been EPA's interpretation of the geographic jurisdictional scope of the CWA for approximately 40 years. Congress has also been aware of and has supported the Agency's longstanding interpretation of the CWA. "Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.' " *North Haven Board of Education* v. *Bell,* 102 456 U.S. 512, 535 (1982) (*quoting United States* v. *Rutherford,* 442 U.S. 544 n. 10 (1979) (internal quotes omitted)).

The 1977 amendments to the CWA were the result of Congress' thorough analysis of the scope of CWA jurisdiction in light of EPA and Corps regulations. The 1975 interim final regulations promulgated by the Corps in response to *NRDC* v. *Callaway,*[21] aroused considerable congressional interest. Hearings on the subject of section 404 jurisdiction were held in both the House and the Senate.[22] An amendment to limit the geographic reach of section 404 to waters that are navigable for purposes of Federal regulation under the Commerce Clauses and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95–830, 95th Cong., 1st Sess. 97–105 (1977). Congress rejected the proposal to limit the geographic reach of section 404 because it wanted a permit system with "no gaps" in its protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph). Rather than alter the *geographic* reach of section

[19] *See id.* at 9 ("The scope of the 1899 Refuse Act is broadened; the administrative capability is strengthened."); *id.* at 43 ("Much of the Committee's time devoted to this Act centered on an effort to resolve the existing water quality program and the separate pollution program developing under the 1899 Refuse Act."). Congress made an effort "to weave" the Refuse Act permit program into the 1972 Amendments, *id.* at 71, as the statutory text shows. *See* 33 U.S.C. 1342(a) (providing that each application for a permit under 33 U.S.C. 407, pending on October 18, 1972, shall be deemed an application for a permit under 33 U.S.C. 1342(a)).

[20] *City of Milwaukee* v. *Illinois,* 451 U.S. at 317; *see also id.* at 318 (holding that the CWA precluded Federal common-law claims because "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation"); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n,* 453 U.S. 1, 22 (1981) (existing statutory scheme "was completely revised" by enactment of the CWA).

[21] 40 FR 31320, 31324 (July 25, 1975).

[22] *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works,* 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation,* 94th Cong., 1st Sess. (1975).

404, Congress amended the statute by exempting certain *activities*—most notably certain agricultural and silvicultural activities—from the permit requirements of section 404. *See* 33 U.S.C. 1344(f).

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of section 404, it was well aware of the jurisdictional scope of EPA and the Corps' definition of "waters of the United States." For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

> Interim final regulations were promulgated by the [C]orps [on] July 25, 1975.* * * Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the [C]orps revised its regulations to further streamline the program and correct several misunderstandings. * * * Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource. Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries. . . .

This legislative history leaves no room for doubt that Congress was aware of the agencies' definition of navigable waters. While there was controversy over the assertion of jurisdiction over all adjacent wetlands and some non-adjacent wetlands, the agencies' assertion of CWA jurisdiction over interstate waters was uncontroversial.

Finally, the constitutional concerns which led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos* are not present here where the agency is asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over non-adjacent, non-navigable, intrastate waters because the Court felt such an interpretation of the statute invoked the outer limits of Congress' power. The Court's concern "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 172–173 (citations omitted). Authority over interstate waters is squarely within the bounds of Congress' Commerce Clause powers.[23] Further, the Federal Government is in the best position to address issues which may arise when waters cross state boundaries, so this interpretation does not disrupt the Federal-State framework in the manner the Supreme Court feared that the assertion of jurisdiction over a non-adjacent, non-navigable, intrastate body of water based on the presence of migratory birds did. The Supreme Court's analysis in *Illinois* v. *Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create Federal law to resolve interstate water pollution disputes. Therefore, as discussed in Section II.B above, it is appropriate for the agencies to adopt an interpretation of the extent of CWA jurisdiction over interstate waters that gives full effect to *City of Milwaukee* unless and until the Supreme Court elects to revisit its holding in that case.

Thus, based on the language of the statute, the statutory history, the legislative history, and the caselaw, the agencies' continue their longstanding interpretation of "navigable waters" to include interstate waters.

Tributaries

In *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* "establish the framework for" determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of "navigable waters"—"the connection between a non-navigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act;" and "[a]bsent a significant nexus, jurisdiction under the Act is lacking." 547 U.S. at 767. "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. 1251(a), and it pursued that objective by restricting dumping and filling in 'navigable waters,' sections 1311(a), 1362(12)." *Id.* at 779. "Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands and other waters that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. He further concluded that wetlands possess the requisite significant nexus: "if the wetlands, either alone or in combination with similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

While Justice Kennedy's opinion focused on adjacent wetlands in light of the facts of the cases before him, the agencies determined it was reasonable and appropriate to undertake a detailed examination of the scientific literature to determine whether tributaries, as a category and as the agencies propose to define them, significantly affect the chemical, physical, or biological integrity of downstream navigable waters, interstate waters, or territorial seas into which they flow. Based on this extensive analysis, the agencies concluded that tributaries with bed and banks, and ordinary high water marks, alone or in combination with other tributaries, as defined by the proposed regulation, in the watershed perform these functions and should be considered, as a category, to be "waters of the United States."

The assertion of jurisdiction over this category of waters is fully consistent with Justice Kennedy's opinion in *Rapanos*. "Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands and other waters that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. With respect to tributaries, Justice Kennedy rejected the plurality's approach that only "relatively permanent" tributaries are within the scope of CWA jurisdiction. He stated that the plurality's requirement of "permanent standing water or continuous flow, at least for a period of 'some months' . . . makes little practical sense in a statute concerned with downstream water quality." *Id.* at 769. Instead, Justice Kennedy concluded that "Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so;" in fact, he stated that Congress has done "[q]uite the opposite . . .." *Id.* at 769. Further, Justice Kennedy concluded, based on "a full reading of the dictionary definition" of "waters," that "*the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.*" *Id.* at 770 (emphasis added).

Moreover, Justice Kennedy's opinion did not reject the agencies' existing regulations governing tributaries. The consolidated cases in *Rapanos* involved discharges into *wetlands* adjacent to nonnavigable tributaries and, therefore, Justice Kennedy's analysis focused on the requisite showing for *wetlands*. Justice Kennedy described the Corps' standard for asserting jurisdiction over tributaries: "the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark . . .." *Id.* at 781, *see also id* at 761. He acknowledged that this requirement of a perceptible ordinary high water mark for ephemeral streams, 65 FR 12828, March 9, 2000, "[a]ssuming it is subject to reasonably consistent application, . . . may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute navigable waters under the Act." 547 U.S. at 781, *see also id.* at 761. With respect to wetlands, Justice Kennedy concluded that the breadth of this standard for tributaries precluded use of adjacency to such tributaries as the determinative measure of whether *wetlands* adjacent to such tributaries "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.* at 781. He did not, however, reject the Corps' use of "ordinary high water mark" to assert regulatory jurisdiction over tributaries themselves. *Id.*

In the foregoing passage regarding the existing regulatory standard for ephemeral streams, Justice Kennedy also provided a "but see" citation to a 2004 U.S. General Accounting Office (now the U.S. Government Accountability Office) (GAO) report "noting variation in results among Corps district offices." *Id.* In 2005, the Corps issued a regulatory guidance letter (RGL 05–05) to Corps districts on OHWM identification that was designed to ensure more consistent practice. The Corps has also issued documents to provide additional technical assistance for problematic OHWM delineations. *See, e.g.,* R.W. Lichvar and S.M.

[23] In *Illinois* v. *Milwaukee*, the Supreme Court noted that "Congress has enacted numerous laws touching interstate waters." 406 U.S. at 101.

McColley, U.S. Army Corps of Engineers, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual*, ERDC/CRREL TR–08–12 (2008). Moreover, the agencies propose today for the first time a regulatory definition of "tributary." The definition expressly addresses some of the issues with respect to identification of an OHWM that caused many of the inconsistencies reported by the GAO. For example, this proposed regulation clearly provides that a water that otherwise meets the proposed definition of tributary remains a jurisdictional tributary even if there are natural or man-made breaks in the OHWM. The proposed definition also provides a non-exclusive list of examples of breaks in the OHWM to assist in clearly and consistently determining what meets the definition of tributary.

Most fundamentally, the agencies believe that the scientific literature demonstrates that tributaries, as a category and as the agencies propose to define them, play a critical role in the integrity of aquatic systems comprising traditional navigable waters and interstate waters, and therefore are "waters of the United States" within the meaning of the Clean Water Act.

Adjacent Waters

The CWA explicitly establishes authority over adjacent wetlands. Under section 404(g), states are authorized to assume responsibility for administration of the section 404 permitting program with respect to "navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, *including wetlands adjacent thereto*)." 33 U.S.C. 1344(g)(1) (emphasis added). While this provision mainly serves as a limitation on the scope of waters for which states may be authorized to issue permits, it also shows that Congress was concerned with the protection of adjacent wetlands and recognized their important role in protecting downstream traditional navigable waters. Indeed, the existing definition of adjacency was developed in recognition of the integral role wetlands play in broader aquatic ecosystems:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

42 FR 37128, July 19, 1977.

As the Supreme Court found in *United States* v. *Riverside Bayview Homes, Inc.*, "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.

In upholding the Corps' judgment about the relationship between waters and their adjacent wetlands, the Supreme Court in *Riverside Bayview* acknowledged that the agencies' regulations take into account functions provided by wetlands in support of this relationship. "[A]djacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.'" *Id.* at 133 (*citing* § 320.4(b)(2)(i)). The Court further stated that the Corps had reasonably concluded that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." 474 U.S. at 135.

Two decades later, a majority of justices in *Rapanos* concluded that the agencies' regulatory definition of adjacent wetlands reasonable. Justice Kennedy stated:

> As the Court noted in *Riverside Bayview*, 'the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR 320.4(b)(2)(vii)(1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see § 320.4(b)(2)(iv) and (v).' Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would.. . . In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

547 U.S. at 775 (citations omitted).

The four dissenting justices similarly concluded:

> The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision.

Id. at 778 (*citing Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984)).

For those wetlands adjacent to traditional navigable waters, Justice Kennedy concluded in *Rapanos* that the agencies' existing regulation "rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 547 U.S. at 780. For other adjacent waters, including adjacent wetlands, Justice Kennedy's significant nexus standard provides a framework for establishing categories of waters which are *per se* "waters of the United States." First, he provided that wetlands are jurisdictional if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Next, Justice Kennedy stated that "[t]hrough regulation or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780–81.

While the issue was not before the Supreme Court, it is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is a touchstone for CWA jurisdiction. The agencies have determined that adjacent waters as defined in today's proposed rule, alone or in combination with other adjacent waters in the region that drains to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, and biological integrity of those waters. As explained in more detail in Section H, below, the proposed rule interprets the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry. The agencies have determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of these systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate reflection of Congressional intent.

The agencies have concluded that all waters that meet the proposed definition of "adjacent" are similarly situated for purposes of analyzing whether they, in the majority of cases, have a significant nexus to an (a)(1) through (a)(3) water. Based on the agencies' review of the scientific literature, we have concluded that these waters, when bordering, contiguous or located in the floodplain or riparian area, or when otherwise meeting the definition of "adjacent," provide many similar functions that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Further, because the proposed definition generally

focuses on the location of the waters (i.e., those that are located near (a)(1) through (a)(5) waters), interpreting the term "similarly situated" to include all adjacent waters, as defined in the proposed rule, is reasonable and consistent with the science. The geographic position of an "adjacent" water relative to the tributary is indicative of the relationship to it, with many of its defining characteristics resulting from the movement of materials and energy between the categories of waters. The scientific literature documents that waters that are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of stream networks because of their ecological functions and how they interact with each other, and with downstream traditional navigable waters, interstate waters, or the territorial seas. In other words, tributaries and their adjacent waters, and the downstream traditional navigable waters, interstate waters, and territorial seas into which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into any component of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, or biological integrity of these waters.

Based on the science, as summarized below, the agencies have concluded that wetlands and waters adjacent to all tributaries that meet the proposed definition of "tributary" provide vital functions for downstream traditional navigable waters, interstate waters, or the territorial seas. In particular, the scientific literature supports the conclusion that waters adjacent to all tributaries as defined in section (a)(5) have a significant nexus to waters described in paragraphs (a)(1) through (a)(3). Because smaller streams, whether perennial, intermittent, or ephemeral, are much more common than larger streams, the volume of a stream's flow is not the best measure of its contribution to the chemical, physical, or biological integrity of downstream waters. Report at 4–2, 4–3. As discussed in more detail in Appendix A, small streams cumulatively exert a strong influence on downstream waters, partly by collectively providing a substantial amount of the river's water, *id.* at 4–3, 4–4 to 4–5, but also by playing unique roles that large streams typically do not, including providing habitat for aquatic macroinvertebrates which help maintain the health of the downstream water. Waters adjacent to those small tributary streams, therefore, also significantly affect (a)(1) through (a)(3) waters through the movement of energy and materials between adjacent waters and those tributaries, resulting ultimately in significant downstream effects on the chemical, physical, and biological integrity of the (a)(1) through (a)(3) waters.

"Other Waters"

In *Rapanos,* Justice Kennedy provides an approach for determining what constitutes a "significant nexus" that can serve as a basis for defining "waters of the United States" through regulation. Justice Kennedy concluded that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (*citing SWANCC,* 531 U.S. at 167, 172) Again, the four justices who signed on to Justice Stevens' opinion would have upheld jurisdiction under the agencies' existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion. Justice Kennedy stated that wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: "if the wetlands, either alone or in combination with similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. In light of *Rapanos* and *SWANCC,* the "significant nexus" standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can reasonably be applied to other waters such as ponds, lakes, and non-adjacent wetlands that may have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas.

The proposed rule includes a definition of significant nexus that is consistent with Justice Kennedy's significant nexus standard. In characterizing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . .." 547 U.S. at 779. It clear that Congress intended the CWA to "restore and maintain" all three forms of "integrity," 33 U.S.C. 1251(a), so if any one form is compromised then that is contrary to the statute's stated objective. It would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea. Therefore, a showing of a significant chemical, physical, or biological affect should satisfy the significant nexus standard.

Justice Kennedy's opinion provides guidance pointing to many functions of waters that might demonstrate a significant nexus, such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, and runoff storage. *See* 547 U.S. at 775, 779–80. Furthermore, Justice Kennedy recognized that a hydrologic connection is not necessary to establish a significant nexus, because in some cases the absence of a hydrologic connection would show the significance of a water to the aquatic system, such as retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water or interstate water. *Id.* at 775. Finally, Justice Kennedy was clear that the requisite nexus must be more than "speculative or insubstantial" in order to be significant. *Id.* at 780. Justice Kennedy's standard is consistent with basic scientific principles about how to restore and maintain the integrity of aquatic ecosystems.

Similarly Situated

For purposes of analyzing the significant nexus of tributaries and adjacent waters, tributaries that meet the proposed definition of "tributary" in a watershed draining to an (a)(1) through (a)(3) water are similarly situated, and adjacent waters that meet the proposed definition of "adjacent" in a watershed draining to an (a)(1) through (a)(3) water are similarly situated. That is reasonable because the agencies are identifying characteristics of those waters through the regulation and documenting the science that demonstrates that these defined tributaries and defined adjacent waters provide similar functions in the watershed. As stated above, the functions of the tributaries are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water or interstate water. There is also an obvious locational relationship between the (a)(1), (a)(2) or (a)(3) water and the streams, lakes, and wetlands that meet the definition of tributaries and the definition of adjacent waters; those waters have a clear linear relationship resulting from the simple existence of the channel itself and the direction of flow. *See* Appendix A, Scientific Evidence.

"Other waters," on the other hand, constitute a broad range of different types of waters performing different functions. In light of the range and degree of functions performed by waters that are neither tributaries nor adjacent waters under today's proposed rule, the agencies propose a definition of similarly situated which takes into account similarity of functions provided and situation in the landscape. Since the focus of the significant nexus standard is on protecting the chemical, physical, and biological integrity of the nation's waters, the agencies propose to interpret the phrase "similarly situated" in terms of whether the functions provided by the particular "other waters" are similar and, therefore, whether such "other waters" are collectively influencing the chemical, physical, or biological integrity of downstream waters. There are many functions of waters that might demonstrate a significant nexus, such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of habitat. *See* 547 U.S. at 775, 779–80. This approach is consistent not only with the significant nexus standard, but with the science of aquatic systems.

The absence of a hydrologic connection between "other waters" and traditional navigable waters, interstate waters, or the territorial seas may demonstrate the presence of a significant nexus between such waters, as Justice Kennedy recognized in his opinion. "Other waters" frequently function alone or cumulatively with similarly situated "other waters" in the region to capture runoff, rain water, or snowmelt and thereby protect the integrity of downstream waters by reducing potential flooding or trapping pollutants that would otherwise reach a traditional navigable water or interstate water. *See id.* at 775. Such waters can be crucial in controlling flooding as well as in maintaining water quality by trapping or transforming

pollutants such as excess nutrients or sediment, for example, or retaining precipitation or snow melt, thereby reducing contamination or flooding of traditional navigable waters, interstate waters, or the territorial seas.

Significant Nexus

The agencies propose to define the term "significant nexus" consistent with language in *SWANCC* and *Rapanos*. The proposed definition of "significant nexus" at (c)(7) relies most significantly on Justice Kennedy's *Rapanos* opinion which recognizes that not all waters have this requisite connection to waters covered by paragraphs (a)(1) through (a)(3) of the proposed regulations. Justice Kennedy was clear that the requisite nexus must be more than "speculative or insubstantial. . .," *Rapanos,* 547 U.S. at 780, in order to be significant and the proposed rule defines significant nexus in precisely those terms. In *Rapanos,* Justice Kennedy stated that in both the consolidated cases before the Court the record contained evidence suggesting the possible existence of a significant nexus according to the principles he identified. *See id.* at 783. Justice Kennedy concluded that "the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid." *Id.* Justice Kennedy remanded the cases because neither the agency nor the reviewing courts properly applied the controlling legal standard—whether the wetlands at issue had a significant nexus. *See id.* Justice Kennedy was clear however, that "[m]uch the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected." *Id.* at 784.

With respect to one of the wetlands at issue in the consolidated *Rapanos* cases, Justice Kennedy stated:

> In *Carabell,* No. 04–1384, the record also contains evidence bearing on the jurisdictional inquiry. The Corps noted in deciding the administrative appeal that "[b]esides the effects on wildlife habitat and water quality, the [district office] also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. . . . The Corps' evaluation further noted that by 'eliminat[ing] the potential ability of the wetland to act as a sediment catch basin," the proposed project "would contribute to increased runoff and . . . accretion along the drain and further downstream in Auvase Creek.' . . . And it observed that increased runoff from the site would likely cause downstream areas to "see an increase in possible flooding magnitude and frequency."
>
> Id. at 785–86. Justice Kennedy also expressed concern that "[t]he conditional language in these assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation." *Id.*at 786.

Justice Kennedy's observations regarding the above case provide guidance as to what it means for a nexus to be more than merely speculative or insubstantial and inform the proposed definition of "significant nexus." It is important to note, however, that where Justice Kennedy viewed the language "more than speculative or insubstantial" to suggest an undue degree of speculation, scientists do not equate certain conditional language (such as "may" or "could") with speculation, but rather with the rigorous and precise language of science necessary when applying specific findings in another individual situation or more broadly across a variety of situations. Certain terms used in a scientific context do not have the same implications that they have in a legal or policy context. Scientists use cautionary language, such as "may" or "could," when applying specific findings on a broader scale to avoid the appearance of overstating their research results and to avoid inserting bias into their findings (such that the reader may think the results of one study are applicable in all related studies). Words like "potential" are commonly used in the biological sciences, but when viewed under a legal and policy veil, may seem to mean the same as "speculative" or "insubstantial." Instead, potential in scientific terms means ability or capability. For example, when the term "potential" is used to describe how a wetland has the potential to act as a sink for floodwater and pollutants, scientists mean that wetlands in general do indeed perform those functions, but whether a particular wetland performs that function is dependent upon the circumstances that would create conditions for floodwater or pollutants in the watershed to reach that particular wetland to retain and transform. That does not mean, however, that this nexus to downstream waters is "speculative;" indeed the wetland would be expected to provide these functions under the proper circumstances.

Definition of "Waters of the United States" Under the Clean Water Act.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Part 110

Environmental protection, Water pollution control.

40 CFR Part 112

Environmental protection, Water pollution control.

40 CFR Part 116

Environmental protection, Water pollution control.

40 CFR Part 117

Environmental protection, Water pollution control.

40 CFR Part 122

Environmental protection, Water pollution control.

40 CFR Part 230

Environmental protection, Water pollution control.

40 CFR Part 232

Environmental protection, Water pollution control.

40 CFR Part 300

Environmental protection, Water pollution control.

40 CFR Part 302

Environmental protection, Water pollution control.

40 CFR Part 401

Environmental protection, Water pollution control.

Dated: March 25, 2014.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: March 24, 2014.

Jo Ellen Darcy,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by removing the introductory text and revising paragraphs (a), (b), and (c) to read as follows:

§ 328.3 Definitions.

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non wetland swales.

(c) Definitions

(1) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(2) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.

(6) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.

* * * * *

Title 40—Protection of Environment

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1321 *et seq.*

■ 4. Section 110.1 is amended by revising the definition of "navigable waters" to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1321 *et seq.*

■ 6. Section 112.2 is amended by revising the definition of "navigable waters" to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition ——

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(6) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

■ 7. The authority citation for part 116 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of "navigable waters" to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean "waters of the United States, including the territorial seas."

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;.

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (viii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this section.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 10. Section 117.1 is amended by revising the definition of "navigable waters" to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* means "waters of the United States, including the territorial seas."

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (i)(1)(i) through (iii) and (v) of this section;

(v) All tributaries of waters identified in paragraphs (i)(1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (i)(1)(i) through (v) of this section; and

(vii) On a case specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (i)(1)(i) through (vii) of this section—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (i)(1)(i) through (iv) of this section.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (i)(1)(i) through (iv) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (i)(1)(i) through (iii) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (i)(2)(iii) or (iv) of this section.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by revising the definition of "Waters of the United States" and removing the note and editorial note at the end of the section.

The revision reads as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this definition, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this definition;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this definition;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.

(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.[1]

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

(c) Definitions—

(1) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(2) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this definition.

(6) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition.

* * * * *

[1] At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision (48 FR 14153, Apr. 1, 1983) continues that suspension.

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 14. Section 230.3 is amended by revising paragraphs (s) and (t) and adding paragraph (u) to read as follows:

§ 230.3 Definitions.

* * * * *

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (s)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

(u) Definitions—

(1) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(2) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

PART 232– 404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 232 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 16. Section 232.2 is amended by revising the definition of "Waters of the United States" to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States or *waters* means:

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this section.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 18. Section 300.5 is amended by revising the definition of "navigable waters" to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

■ 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of "navigable waters" to read as follows:

Appendix E to Part 300—Oil Spill Response.

1.5 Definitions. * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 21. Section 302.3 is amended by revising the definition of "navigable waters" to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (l)(2) of this section, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (l)(1)(i) through (iii) and (v) of this section;

(v) All tributaries of waters identified in paragraphs (l)(1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (l)(1)(i) through (v) of this section; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (l)(1)(i) through (vii) of this section—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another

water, to a water identified in paragraphs (l)(1)(i) through (iv) of this section.

(v) The following features:

(A) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (l)(1)(i) through (v) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (l)(1)(i) through (iv) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (l)(1)(i) through (iii) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man altered, or man made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (l)(2)(iii) or (iv) of this section.

(vi) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(vii) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (l)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (l)(1)(i) through (iii) of this section.

* * * * *

[FR Doc. 2014-07142 Filed 4-18-14; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Part III

Department of Defense

Department of the Army, Corps of Engineers

Environmental Protection Agency

Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2013–0820; 9908–97–OW]

Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

AGENCIES: U.S. Army Corps of Engineers (Corps), Department of the Army, Department of Defense, and the Environmental Protection Agency (EPA).

ACTION: Notice of availability and public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are announcing the availability of an interpretive rule to address the exemption from permitting provided under section 404(f)(1)(A) of the Clean Water Act (CWA) for discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service (NRCS) conservation practice standards that are designed and implemented to protect and enhance water quality. While the interpretive rule is already in effect, the agencies recognize the importance and value of receiving public input on the implementation of this interpretive rule and welcome comments in response to this notice within the next 45 days.

DATES: Submit comments on or before June 5, 2014.

ADDRESSES: The interpretive rule, as well as a list of NRCS practices that meet the exemption, are available via the Internet on the EPA Web site: *http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm.* EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2013–0820. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Water Docket, EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, Monday through Friday, excluding legal holidays. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

FOR FURTHER INFORMATION CONTACT: Ms. Damaris Christensen, Office of Water (4502–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202–564–2442; email address: *Wetlands_HQ@epa.gov* or Mr. Chip Smith, Office of the Deputy Assistant Secretary of the Army (Policy and Legislation), 108 Army Pentagon, Washington, DC 22310; telephone number 703–697–4672; *USACE_CWA_RULE@usace.army.mil* or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number 202–761–5856; email address *USACE_CWA_RULE@usace.army.mil*

SUPPLEMENTARY INFORMATION:

I. Information About the Document

Section 404(f)(1)(A) of the CWA exempts from section 404 permit requirements certain discharges associated with normal farming, silviculture, and ranching activities in "waters of the United States," including wetlands. To provide additional clarity to farmers and to promote practices under the Agriculture Act of 2014 designed to improve water quality, the EPA and the Corps have signed an interpretive rule, "Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices." The interpretive rule was developed in coordination with the U.S. Department of Agriculture.

The agencies believe working together to improve the consistency and integration of these programs is fully consistent with the law, promotes the mutual objectives of our regulations and statutes, and increases clarity and predictability for the agriculture community. The result is good for the nation's waters and for farmers and foresters who want to protect the resources on their lands.

The agencies have identified specific NRCS agricultural conservation practices that are appropriately considered "normal farming" activities and exempt from permitting under section 404(f)(1)(A). The agencies and NRCS have also entered into a Memorandum of Understanding to guide their future coordination on the exemption. The list of practices, the Memorandum of Understanding, and the interpretive rule are available on the EPA Web site at *http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm* and in the docket for this notice. The agencies seek comment on these documents within the next 45 days. The agencies and NRCS intend to periodically revisit and revise, if necessary, the list of exempt NRCS conservation practice standards. The agencies are particularly interested in receiving comments on how they might most effectively and efficiently conduct this periodic review and how best to revise the list of exempt NRCS practice standards. The agencies also request comment on how they can best work together and with NRCS to provide clarity to the regulated community and the public on the exemption.

Dated: March 25, 2014.

Nancy K. Stoner,

Acting Assistant Administrator for Water, Environmental Protection Agency.

Dated: March 25, 2014.

Jo-Ellen Darcy,

Assistant Secretary of the Army (Civil Works), Department of the Army.

[FR Doc. 2014–07131 Filed 4–18–14; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Part IV

Department of Energy

10 CFR Parts 429 and 431
Energy Conservation Program: Test Procedure for Commercial Refrigeration Equipment; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[Docket No. EERE–2013–BT–TP–0025]

RIN 1904–AC99

Energy Conservation Program: Test Procedure for Commercial Refrigeration Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (DOE) revises and reorganizes its test procedure for commercial refrigeration equipment (CRE) to clarify certain terms, procedures, and compliance dates to improve the repeatability and remove ambiguity from the CRE test procedure. In this final rule, DOE also addresses a number of test procedure clarifications that arose as a result of the negotiated rulemaking process for certification of commercial heating, ventilation, air conditioning, refrigeration, and water heating equipment.

DATES: The effective date of this rule is May 21, 2014.

The incorporation by reference of certain publications listed in this final rule is approved by the Director of the Office of the Federal Register as of May 21, 2014.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page can be found at: *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx?ruleid=80.* This Web page will contain a link to the docket for this rulemaking on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6590. Email: *commercial_refrigeration_equipment@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6111. Email: *mailto:Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: This final rule incorporates by reference into 10 CFR part 431 the following industry standards:

(1) ANSI/ASHRAE 72–2005, ("ASHRAE 72–2005"), "Method of Testing Commercial Refrigerators and Freezers," Copyright 2005.

(2) ASTM E 1084–86 (Reapproved 2009), "Standard Test Method for Solar Transmittance (Terrestrial) of Sheet Materials Using Sunlight," approved April 1, 2009.

Copies of ASHRAE standards may be purchased from the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1971 Tullie Circle NE., Atlanta, GA 30329, or at *www.ashrae.org/.*

Copies of ASTM standards may be purchased from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428, (877) 909–2786, or at *www.astm.org/.*

Table of Contents

I. Authority and Background
A. Authority
B. Background
II. Summary of the Final Rule
III. Discussion
A. Amendments to the Test Procedure
1. Scope of Coverage
a. Salad Bars, Buffet Tables, and Other Refrigerated Holding and Serving Equipment
b. Chef Bases and Griddle Stands
c. Existing Cases Undergoing Refurbishments or Retrofits
d. Case Doors Shipped as After-Market Additions
2. Definitions Pertinent to Commercial Refrigeration Equipment
a. Commercial Refrigeration Equipment With Drawers
b. Transparent and Solid Doors
c. Hybrid Equipment and Commercial Refrigerator-Freezers
3. Relationship Among Rating Temperature, Operating Temperature, and Integrated Average Temperature
4. Proper Configuration and Use of Components or Features in the DOE Test Procedure
a. Energy Management Systems
b. Lighting
c. Test Package Temperatures
5. Treatment of Other Specific Equipment Features and Accessories During Testing
a. Customer Display Signs/Lights
b. Condensate Pan Heaters and Pumps
c. Anti-Sweat Door Heaters
d. Ultraviolet Lights
e. Illuminated Temperature Displays and Alarms
f. Condenser Filters
g. Refrigeration System Security Covers
h. Night Curtains and Covers
i. Grill Options
j. Coated Coils
k. Internal Secondary Coolant Circuits
l. Wedge Cases
m. Misting or Humidification Systems
n. Air Purifiers
o. General Purpose Outlets
p. Crankcase Heaters
q. Interior/Exterior Liners
r. Other Comments Received From Interested Parties
6. Rounding of Test Results and Certified Ratings
7. Testing at the Lowest Application Product Temperature
a. Definition of Lowest Application Product Temperature
b. Incorporation by Reference of ASHRAE 72–2005
8. Clarifications in Response to Interpretations to AHRI 1200–2010
9. Clarification of Methodology for Measuring Total Display Area
10. Compliance Date of Test Procedure Amendments
B. Other Notice of Proposed Rulemaking Comments and DOE Responses
1. Ambient Test Temperatures
2. Burden of Testing
IV. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
M. Congressional Notification
V. Approval of the Office of the Secretary

I. Authority and Background

A. Authority

Title III, Part C of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, Sec. 441(a), established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain industrial equipment, which includes the commercial refrigeration equipment that is the focus

of this final rule.[1] All references to EPCA refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210 (Dec. 18, 2012).

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered equipment must use as the basis for (1) certifying to DOE that their equipment complies with the applicable energy conservation standards adopted under EPCA, (42 U.S.C. 6316(e)(1)), and (2) making representations about the efficiency of that equipment. (42 U.S.C. 6314(d)) Similarly, DOE must use these test procedures to determine whether the equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6316(e)(1))

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment. EPCA provides, in relevant part, that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results that reflect energy efficiency, energy use and estimated annual operating costs of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6314(c)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product or equipment[2] as determined under the existing test procedure. If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6314(a)(6)(D))

Under 42 U.S.C. 6314(c)(1), no later than 3 years after the date of prescribing a test procedure pursuant to 42 U.S.C. 6314, and from time to time thereafter, DOE is required to conduct a reevaluation and determine whether to amend the test procedure. If DOE determines a test procedure should be amended, it shall promptly publish in the **Federal Register** proposed test procedures, incorporating such amendments and affording interested persons an opportunity to present oral and written data, views, and arguments. (42 U.S.C. 6314(c)(2))

In February 2012, DOE published a final rule (2012 test procedure final rule) prescribing new amendments to the test procedure for commercial refrigeration equipment. 77 FR 10291, 10318–21 (Feb. 21, 2012). Pursuant to EPCA's requirement in 42 U.S.C. 6314(c), DOE has reevaluated the CRE test procedure and concluded that it should be amended to clarify a number of provisions regarding how aspects of the test are conducted, to more explicitly define some terms, and to more clearly specify the compliance dates for various provisions. DOE's adopted amendments to the test procedure are presented in this final rule.

B. Background

EPCA mandates that the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 117–2002, "Method of Testing Closed Refrigerators," shall be the initial test procedure for the types of equipment to which standards are applicable under 42 U.S.C. 6313(c)(2)–(3). (42 U.S.C. 6314(a)(6)(A)(ii)) EPCA requires DOE to address whether to amend its test procedures if ASHRAE amends this standard. (42 U.S.C. 6314(a)(6)(E)–(F)) In 2005, ASHRAE combined Standard 72–1998, "Method of Testing Open Refrigerators," and Standard 117–2002 and published the test method as ASHRAE Standard 72–2005 (ASHRAE 72–2005), "Method of Testing Commercial Refrigerators and Freezers," which was approved by the American National Standards Institute (ANSI) on July 29, 2005. Consistent with EPCA's requirement in 42 U.S.C. 6314(a)(6)(E), DOE reviewed ASHRAE 72–2005, as well as American Refrigeration Institute (ARI) Standard 1200–2006 (ARI 1200–2006), which was approved by ANSI on August 28, 2006. DOE determined that ARI 1200–2006 included by reference the test procedures in ASHRAE 72–2005 and the rating temperatures prescribed in EPCA. (42 U.S.C. 6314(a)(6)(B)) As a result, DOE published a final rule in December 2006 (2006 test procedure final rule) that adopted ARI 1200–2006 as the DOE test procedure for commercial refrigeration equipment. 71 FR 71340, 71357 (Dec. 8, 2006). The 2006 test procedure final rule specified rating temperatures of 38 °F (±2 °F) for commercial refrigerators and refrigerator compartments, 0 °F (±2 °F) for commercial freezers and freezer compartments, and −15 °F (±2 °F) for commercial ice-cream freezers. 71 FR at 71370 (Dec. 8, 2006). DOE also adopted Association of Home Appliance Manufacturers (AHAM) Standard HRF–1–2004, "Energy, Performance and Capacity of Household Refrigerators, Refrigerator-Freezers and Freezers," for measuring compartment volumes for equipment covered under the 2006 test procedure final rule. 71 FR at 71358 (Dec. 8, 2006). The test procedure established in the 2006 final rule became effective on January 8, 2007 (71 FR at 71340), and its use has been required to demonstrate compliance with the current energy conservation standards.

More recently, on February 21, 2012, DOE published the aforementioned 2012 test procedure final rule, in which it adopts several amendments to the DOE test procedure for commercial refrigeration equipment. These amendments include updating the standard incorporated by reference in the DOE test procedure in response to the relevant industry organizations issuing updated versions. Specifically, DOE updated the incorporation by reference of Air-Conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1200 (I–P)–2010 (AHRI 1200–2010), "Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets," as the DOE test procedure for this equipment. 77 FR at 10318 (Feb. 21, 2012). The 2012 test procedure final rule also includes an amendment to incorporate by reference the updated ANSI/AHAM Standard HRF–1–2008 (AHAM HRF–1–2008), "Energy, Performance, and Capacity of Household Refrigerators, Refrigerator-Freezers, and Freezers," for determining compartment volumes for this equipment. 77 FR at 10318 and 10321 (Feb. 21, 2012). These updates were primarily editorial in nature and aligned the AHRI test procedure with the nomenclature and methodology used in DOE's 2009 standards rulemaking on commercial refrigeration equipment. The updated AHRI 1200–2010 also

[1] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

[2] The term "covered product" broadly refers to all types of appliances and equipment regulated by DOE regardless of whether they are consumer products or commercial and industrial equipment.

references the most recent version of the AHAM standard, AHAM HRF–1–2008.

In addition, the 2012 test procedure final rule includes several amendments designed to address certain energy efficiency features that were not accounted for by the previous DOE test procedure, including provisions for measuring the impact of night curtains,[3] lighting occupancy sensors, and scheduled controls. 77 FR at 10296–10298 and 10319–10320 (Feb. 21, 2012). In the 2012 test procedure final rule, DOE also adopts amendments to allow testing of commercial refrigeration equipment that cannot operate at the rating temperature specified in the DOE test procedure. Specifically, the 2012 test procedure final rule allows testing of commercial refrigeration equipment at its lowest application product temperature (LAPT), for equipment that is physically incapable of reaching the prescribed rating temperature. 77 FR at 10320 (Feb. 21, 2012). The 2012 test procedure final rule also allows manufacturers to test and certify equipment at the more-stringent rating temperatures and ambient conditions required by NSF[4] for food safety testing. 77 FR at 10320–10321 (Feb. 21, 2012).

The test procedure amendments established in the 2012 test procedure final rule became effective on March 22, 2012. 77 FR at 10292 (Feb. 21, 2012). The amendments are required to be used in conjunction with the amended standards established in DOE's recently published energy conservation standards final rule (March 2014 energy conservation standards final rule) beginning on March 28, 2017. 79 FR 17726, 17727 (Mar. 28, 2014).

Since publication of the 2012 test procedure final rule, DOE has received a number of inquiries from interested parties regarding DOE regulations for commercial refrigeration equipment, including how different types of equipment fit into DOE's definitions of commercial refrigeration equipment at 10 CFR 431.62, and questions involving certain provisions of the DOE test procedure at 10 CFR 431.64. More specifically, DOE has received inquiries and questions regarding the applicability of DOE's test procedure and Federal energy conservation standards to particular models of commercial refrigeration equipment, the proper configuration and use of certain components and features of commercial refrigeration equipment for purposes of testing according to the DOE test procedure, and the compliance date of the amendments specified in the 2012 test procedure final rule. On October 28, 2013, the U.S. Department of Energy (DOE) issued a notice of proposed rulemaking (hereafter referred to as the October 2013 test procedure NOPR) to amend the test procedure for commercial refrigeration equipment (CRE) appearing at 10 CFR 431.64. 78 FR 64296 (Oct. 28, 2013). In the October 2013 test procedure NOPR, DOE presented proposed amendments to address the questions presented by interested parties and, where appropriate, proposed edits to the regulatory language to clarify DOE's existing regulations. 78 FR at 64296 (Oct. 28, 2013).

On February 26, 2013, members of the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) unanimously decided to form a working group to negotiate rulemaking on certification for commercial heating, ventilation, and air-conditioning (HVAC); commercial water heating (WH); and commercial refrigeration equipment. A notice of intent to form the Commercial Certification Working Group was published in the **Federal Register** on March 12, 2013 (Docket No. EERE–2013–BT–NOC–0023). 78 FR 15653 (Mar. 12, 2013). DOE received 35 nominations for the Working Group. On April 16, 2013, DOE published a notice of open meeting that announced the first meeting and listed the 22 nominees that were selected to serve as members of the Working Group, in addition to two members from ASRAC, and one DOE representative. 78 FR 22431 (Apr. 16, 2013). The members of the Working Group were selected to ensure a broad and balanced array of stakeholder interests and expertise, and include efficiency advocates, manufacturers, a utility representative, and third party laboratory representatives. As part of that rulemaking process, DOE conducted a number of regulatory negotiation sessions over the course of the summer of 2013 involving major stakeholders in the CRE market.[5] One outcome of these meetings was an agreement on the need to clarify aspects of the DOE test procedure with respect to the treatment of specific features of commercial refrigeration equipment. On August 30, 2013, the Working Group submitted a report to ASRAC containing recommendations on the certification requirements for HVAC, WH, and refrigeration equipment (Docket No. EERE–2013–BT–NOC–0023, No. 51) and ASRAC voted unanimously to accept these recommendations (Docket No. EERE–2013–BT–NOC–0005, No. 13). In the October 2013 test procedure NOPR, DOE also proposed clarifications of the treatment of those features by the DOE test procedure. 78 FR at 64306–64308 (Oct. 28, 2013).

On December 5, 2013, DOE held a public meeting (December 2013 NOPR public meeting) to present the test procedure amendments proposed in the October 2013 test procedure NOPR and accept comments from interested parties. Interested parties submitted comments on the ambient test conditions and the burden of testing and certification of commercial refrigeration equipment. DOE analyzed all of the comments received in response to the October 2013 test procedure NOPR and incorporated recommendations, where appropriate, into this test procedure final rule.

II. Summary of the Final Rule

In this final rule, DOE adopts amendments to clarify DOE's test procedure provisions, definitions, the treatment of specific accessories when testing under the DOE test procedure, and the applicability of the existing test procedure and standards to different types of commercial refrigeration equipment. Specifically, DOE is adopting edits to definitions currently incorporated into the existing DOE test procedure and including additional definitions to be incorporated into the existing test procedure (reorganized into appendix A to subpart C of 10 CFR part 431). DOE is also adopting edits to definitions and including additional definitions to be incorporated into the test procedure used to determine compliance with the amended energy conservation standards adopted for commercial refrigeration equipment on March 28, 2014 (reorganized into appendix B to subpart C of 10 CFR part 431). 79 FR 17726. DOE does not believe that the test procedure clarifications adopted in this final rule will affect the measured energy use of any covered commercial refrigeration equipment as they relate to the applicable energy conservation standards. Rather, the additional definitions and amendments to the DOE test procedure for commercial refrigeration equipment would serve only to clarify existing nomenclature, testing provisions, compliance dates, and requirements for

[3] Night curtains are devices made of an insulating material, typically insulated aluminum fabric, designed to be pulled down over the open front of the case to decrease infiltration and heat transfer into the case when the merchandizing establishment is closed.

[4] Founded in 1944 as the National Sanitation Foundation, the organization is now referred to simply as NSF.

[5] All of the details of the negotiation sessions can be found in the public meeting transcripts that are posted to the docket for the Working Group (*www.regulations.gov/#!docketDetail;D=EERE-2013-BT-NOC-0023*).

certain features and types of commercial refrigeration equipment; they would not establish new requirements with regard to testing commercial refrigeration equipment.

DOE notes that certification is not currently required for commercial refrigeration equipment. On December 31, 2013, DOE published a final rule adopting amended regulations governing alternative energy determination methods (AEDMs), basic model definition, and the compliance dates for certification of commercial HVAC, refrigeration, and WH (2013 AEDM final rule). 78 FR 79579, 79590. The 2013 AEDM Final Rule adopted a certification date of December 31, 2014, for self-contained, closed solid, and closed transparent commercial refrigeration equipment and a certification date of July 1, 2015, for all other commercial refrigeration equipment. *Id.* DOE also recently published a NOPR proposing, among other things, to revise and expand the certification requirements for commercial refrigeration equipment. 79 FR 8886, 8899–8900 (Feb. 14, 2014). The specific proposals discussed in the NOPR were developed as a result of the negotiations and recommendations of the Working Group for commercial HVAC, WH, and refrigeration equipment (Docket No. EERE–2013–BT–NOC–0023).

III. Discussion

Section III.A presents all of the revisions to the DOE test procedure found at 10 CFR part 431, subpart C, "Uniform test method for measuring the energy consumption of commercial refrigerators, freezers, and refrigerator freezers," incorporated in this final rule, and discusses the comments received on these topics during the December 2013 NOPR public meeting and the associated comment period. The changes adopted as a result of this final rule include revisions addressing the following:

1. The applicability of the test procedure and related energy conservation standards to certain types of equipment;

2. the definitions of "hybrid commercial refrigeration equipment," "commercial refrigeration equipment with drawers," and "commercial refrigeration equipment with solid and/or transparent doors";

3. the relationship among the rating temperature, operating temperature, and integrated average temperature (IAT);

4. the proper configuration and use of energy management systems, lighting controls, and test packages in the DOE test procedure for commercial refrigeration equipment;

5. the treatment of various features and components;

6. the rounding requirements for test results and certified ratings;

7. the provision adopted in the 2012 test procedure final rule to allow testing at the LAPT for equipment that cannot operate at the prescribed rating temperature for its equipment class;

8. clarifications raised by AHRI's Interpretations 1, 2, 3, 4, and 5 of AHRI 1200–2010;

9. the methodology used to determine total display area (TDA); and

10. the compliance date of certain amendments established in the 2012 test procedure final rule.

In response to the October 2013 test procedure NOPR, DOE received several comments from stakeholders that did not pertain to a specific test procedure amendment. In section III.B, DOE provides responses to comments pertaining to (1) the ambient test temperatures required in the DOE test procedure and (2) the burden of testing and certifying equipment as compliant with DOE's energy conservation standards.

A. Amendments to the Test Procedure

This final rule incorporates the following changes to the test procedure for commercial refrigeration equipment in 10 CFR part 431, subpart C.

1. Scope of Coverage

On October 18, 2005, DOE published a final rule adopting EPCA's definition of commercial refrigeration equipment. This definition includes seven provisions pertaining to the operational, functional, and design characteristics of the equipment that must be met for a piece of equipment to qualify as commercial refrigeration equipment. 70 FR 60407, 60414 (Oct. 18, 2005). This definition forms the basis of the scope of coverage of DOE's regulations for commercial refrigeration equipment. While the definition of commercial refrigeration equipment encompasses a broad cross-section of commercial refrigeration equipment types, DOE has only established energy conservation standards for certain types of covered commercial refrigeration equipment specified at 10 CFR 431.66, and these standards apply to all new equipment distributed into U.S. commerce. 76 FR at 12426 and 12437 (March 7, 2011). There are also several types of equipment that meet the definition of commercial refrigeration equipment for which DOE has not yet set energy conservation standards. These include, for example, buffet tables, salad bars, prep tables, and griddle stands.

EPCA and DOE regulations require manufacturers of commercial refrigeration equipment to use the DOE test procedure for commercial refrigeration equipment to evaluate compliance with any applicable energy conservation standards and to support any representations as to the energy use. The DOE test procedure for commercial refrigeration equipment is set forth at 10 CFR 431.64.

In the October 2013 test procedure NOPR, DOE proposed clarifications regarding the applicability of the current DOE energy conservation standards and test procedure to specific equipment categories, including the following:

i. Salad bars, buffet tables, and other refrigerated holding and serving equipment;

ii. chef bases and griddle stands;

iii. existing cases undergoing refurbishments or retrofits; and

iv. cases with doors shipped as after-market accessories.

78 FR at 64299–64300 (Oct. 28, 2013).

a. Salad Bars, Buffet Tables, and Other Refrigerated Holding and Serving Equipment

Salad bars, buffet tables, and other refrigerated holding and serving equipment are types of commercial refrigeration equipment that store and display perishable items temporarily during food preparation or service. As DOE stated in the October 2013 test procedure NOPR, these units typically have specific design attributes, such as easily accessible or open bins that allow convenient and unimpeded access to the refrigerated products, which make them unique from commercial refrigeration equipment designed for storage or retailing. 78 FR at 64299–300 (Oct. 28, 2013). In this final rule, DOE maintains that while salad bars, buffet tables, and other refrigerated holding and serving equipment are covered equipment types because they meet the definition of commercial refrigeration equipment in EPCA, the DOE test procedure and current Federal standards do not apply due to their unique operation. Should DOE decide to consider test procedures or energy conservation standards for salad bars, buffet tables, and other refrigerated holding and serving equipment, it would do so in a future rulemaking.

b. Chef Bases and Griddle Stands

Chef bases and griddle stands are designed to be placed directly under cooking equipment, such as a commercial grill. Chef bases and griddle stands are also designed to provide

food-safe temperatures in extremely hot environments, and thus are designed with uniquely robust refrigeration systems. These refrigeration systems require larger compressors to provide more cooling capacity for the storage volume than equipment with compressors that are appropriately sized for more typical ambient temperatures. As a result, this equipment consumes more energy than similarly sized, standard CRE models.

In the October 2013 test procedure NOPR, DOE stated that chef bases and griddle stands are considered commercial refrigeration equipment according to DOE's definition at 10 CFR 431.62 and stated that it believes that chef bases and griddle stands can be tested using the DOE test procedure for commercial refrigeration equipment. DOE also noted that current energy conservation standards do not apply to these types of equipment and DOE did not consider standards for this equipment in its recent revision of energy conservation standards for commercial refrigeration equipment. 79 FR 17726 (Mar. 28, 2014). DOE further proposed additions to 10 CFR 431.66 to make clear that the current energy conservation standards for commercial refrigeration equipment do not apply to chef bases and griddle stands. 78 FR at 64300 (Oct. 28, 2013). To clearly differentiate "chef bases" and "griddle stands" from conventional types of commercial refrigeration equipment that are currently covered by energy conservation standards, DOE proposed to establish a definition for "chef base" and/or "griddle stand" based on the unique operation of chef bases and griddle stands, which are designed to provide food-safe temperatures in extremely warm environments in excess of 200 °F, and thus are designed with uniquely robust refrigeration systems.

In response to the October 2013 test procedure NOPR, interested parties provided comments on DOE's proposed definition and coverage of chef bases and griddle stands. Continental agreed with DOE's proposed definition of "chef base or griddle stand," stating that it corresponds with industry practice regarding types of units designed and marketed for harsh applications that should be given special consideration for energy consumption limits. (Continental, No. 14 at p. 1) [6] Traulsen suggested that DOE replace the term "cooking equipment" with "cooking appliance," but stated that otherwise found the definition of "chef base or griddle stand" to be acceptable. (Traulsen, No. 17 at p. 1)

Hill Phoenix agreed with DOE that chef bases and griddle stands do not yet have energy conservation standards associated with them and requested that other, similar equipment designed to be placed or mounted directly under equipment that is designed to hold food at an elevated temperature be considered in this category. (Hill Phoenix, No. 13 at p. 1) Similarly, Southern Store Fixtures requested clarification on the exact definition of chef bases, specifically, whether this covered refrigeration units with food warming equipment on top. (Southern Store Fixtures, Public Meeting Transcript, No. 7 at p. 25) True commented that while some consumers may place food-warming equipment on top of a refrigeration unit, a majority of consumers will place high-temperature cooking equipment atop the unit, and manufacturers will almost always design equipment for the harsh case. (True, Public Meeting Transcript, No. 7 at p. 26) Hill Phoenix also noted that NSF Type II equipment is designed to operate at elevated temperatures and similarly would use more energy if tested using the current CRE test procedure (than Type I equipment) and, as such, suggested that NSF Type II equipment also should fall into the category of equipment for which standards have not yet been set. (Hill Phoenix, No. 13 at pp. 1–2)

DOE appreciates the agreement of interested parties with DOE's proposed definition. With regard to replacing the term "cooking equipment" with "cooking appliance," as suggested by interested parties, DOE's appliance standards and commercial equipment program generally refers to equipment as something designed and primarily found in commercial applications, while the term "appliance" refers to a primarily residential application. DOE finds that chef bases and griddle stands, and the associated cooking apparatus placed above these equipment, are typically used in commercial kitchens. As such, DOE believes the term "cooking equipment" is more appropriate than "cooking appliance" for use in the definition of "chef bases" and "griddle stands," as it is consistent with DOE's designation of equipment as designed for commercial applications.

Regarding the inclusion of additional equipment designed for use directly under equipment that is designed to hold food at an elevated temperature as suggested by several commenters, DOE believes that this equipment can be adequately represented in the current CRE equipment categories and does not find sufficient justification to exclude them with the exclusion of "chef bases" and "griddle stands." The categorization of griddle stands was meant to accommodate equipment that experienced temperatures in excess of 200 °F, which requires significant modification of the refrigeration system to maintain cooling in such a high temperature environment. DOE does not find that temperatures required for short-term holding of food are significantly different from the temperatures observed in restaurants or other closed cooking environments in which conventional commercial refrigeration equipment is placed. DOE does not believe that maintenance of refrigeration performance in those environments requires significantly different equipment design, as is the case of "chef bases" and "griddle stands." In addition, DOE has not observed specific marketing or identification of commercial refrigeration equipment designed for use under food-warming and holding equipment. Thus, based on DOE's assessment, the refrigeration system and design of this equipment is not significantly different from other types of commercial refrigeration equipment, and DOE believes that the existing DOE test procedure is sufficiently representative of field use, and application of the existing energy conservation standard appropriate for this equipment.

In response to Hill Phoenix's comment regarding NSF Type II equipment, DOE believes that NSF Type II equipment can be effectively characterized by the existing DOE test procedure and effectively meet the existing energy conservation standards. DOE previously considered NSF Type II equipment in the 2012 test procedure final rule and found that the compressor systems can effectively operate at test temperatures. In the 2012 test procedure final rule, DOE agreed with interested parties that testing cases at an ambient temperature of 80 °F, rather than the currently specified 75 °F, will not have a significant impact on energy consumption for cases with doors and recognized that the impact on open cases may be greater than on closed cases, but did not believe that equipment will have operation or

[6] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop test procedures for commercial refrigeration equipment (Docket No. EERE–2013–BT–TP–0025, which is maintained at *www.regulations.gov*). This particular notation refers to a comment: (1) Submitted by Continental; (2) appearing in document number 14 of the docket; and (3) appearing on page 1 of that document.

performance issues if tested at the temperatures prescribed by the DOE test procedure. 77 FR at 10305–10307 (Feb. 21, 2012). DOE maintains that the energy consumption of a case should scale with ambient temperature and does not believe these issues will prevent units from being tested using the DOE-prescribed test temperatures or complying with DOE energy conservation standards. DOE researched the equipment available on the market and requested specific data regarding the existence of cases that cannot meet the standard or the characteristics of their operation. DOE did not encounter any data arising from this search that would conflict with its current treatment of these equipment types, and no commenters provided any additional data to support the contention that these equipment types cannot meet the DOE standards. In addition, NSF Type II equipment is typically placed outdoors and may see a wide variety of temperatures in the field; thus, DOE finds the current rating conditions of 75 °F and 45 percent relative humidity appropriately representative for this equipment.

c. Existing Cases Undergoing Refurbishments or Retrofits

Energy conservation standards apply only to new equipment manufactured after the effective date of the applicable standard, and not to equipment undergoing retrofits or refurbishments. DOE stated in its certification, compliance, and enforcement (CCE) final rule, published on March 7, 2011, that manufacturers must certify to DOE that each basic model of covered equipment meets the applicable standard before distributing that equipment into U.S. commerce. 76 FR at 12426 and 12437. In the October 2013 test procedure NOPR, DOE clarified that its authority covers only newly manufactured equipment and does not extend to rebuilt and refurbished equipment. 78 FR at 64300 (Oct. 28, 2013).

DOE did not receive any negative comments in response to this clarification and continues to maintain that its energy conservation standards and test procedures apply to only new equipment and not existing equipment undergoing refurbishments or retrofits.

d. Case Doors Shipped as After-Market Additions

A basic model of commercial refrigeration equipment is tested, rated, and subject to specific standards based on the equipment class(es) to which that basic model belongs. For commercial refrigeration equipment, one of the features that distinguishes the current equipment classes for the purposes of applying standards is the presence of doors (*i.e.*, open or closed). In the October 2013 test procedure NOPR, DOE proposed that when a model of commercial refrigeration equipment is offered for sale with doors as an optional accessory, regardless of how the unit is shipped, such unit must be tested and certified as equivalent to a basic model shipped with doors pre-installed. DOE also requested comment on whether, if this same model is offered for sale as a model without doors, it should be tested and rated with no doors installed and meet the corresponding energy conservation standards for open case equipment.

In response to the October 2013 test procedure NOPR, the Northwest Energy Efficiency Alliance (NEEA) commented that it believed equipment that can optionally be sold with doors or without should be tested and certified in each configuration. (NEEA, No. 16 at p. 1) DOE did not receive any negative comments on this proposal.

DOE agrees with NEEA that commercial refrigeration equipment that can optionally be sold with doors or without doors should be treated as separate basic models in separate equipment classes and should be tested both with doors and without doors. This is consistent with the definition of basic models, which is based on features that affect the energy use of a covered piece of equipment as established in DOE's CCE final rule, and requires individual models that would fall into different equipment classes to be certified separately. 76 FR at 12429 (March 7, 2011) (*see* 10 CFR 431.62).

2. Definitions Pertinent to Commercial Refrigeration Equipment

DOE currently categorizes commercial refrigeration equipment by equipment classes based on several general characteristics of a given basic model. 10 CFR 431.62 provides definitions that assist manufacturers in determining which equipment class and associated energy conservation standard applies to a given basic model of commercial refrigeration equipment. However, 10 CFR 431.62 does not provide explicit guidance on how to classify commercial refrigeration equipment with drawers or how to differentiate between a unit with transparent doors and a unit with solid doors. In the October 2013 test procedure NOPR, DOE proposed definitions and clarifications regarding the treatment of commercial refrigeration equipment with drawers and commercial refrigeration equipment with transparent and/or solid doors. 78 FR at 64300–03 (Oct. 28, 2013). DOE also proposed clarification with regard to the definitions for and categorization of hybrid equipment and commercial refrigerator freezers. 78 FR at 64303 (Oct. 28, 2013). These proposals, comments submitted by interested parties, and DOE's response to submitted comments are presented in the subsequent sections.

a. Commercial Refrigeration Equipment With Drawers

DOE's definition of commercial refrigerator, freezer, and refrigerator-freezer specified at 10 CFR 431.62 includes a requirement that the equipment "[h]as transparent or solid doors, sliding or hinged doors, a combination of hinged, sliding, transparent, or solid doors, or no doors." Based on this definition, DOE interprets the term "door" to mean any movable component of the CRE unit that:

1. When closed, separates the interior refrigerated space from the ambient air; and

2. when opened, provides access to the refrigerated products inside the CRE unit.

Based on this definition, in the October 2013 test procedure NOPR, DOE presented its view that drawers are treated as equivalent to doors for purposes of DOE's regulatory program, including compliance with DOE's energy conservation standards. Likewise, DOE believes drawers are treated as doors when conducting the DOE test procedure. 78 FR at 64300–01 (Oct. 28, 2013).

To demonstrate the comparable operation of models of commercial refrigeration equipment with drawers as compared to similar models with traditional doors, in the October 2013 test procedure NOPR, DOE presented the test results for several CRE units with drawers from multiple manufacturers using the current DOE test procedure and compared their performance to nearly identical units with hinged doors (belonging to the vertical closed solid, or VCS, equipment family) from the same manufacturer product lines. As a result of the testing, DOE found that the units with drawers performed similarly to the hinged-door units to which they were compared. DOE also presented the effect of drawer-opening distances for CRE units with drawers and found minimal variation in measured total daily energy consumption (TDEC) at different drawer opening distances. 78 FR at 64301 (Oct. 28, 2013). DOE believes these test results confirm that the door-opening requirements in the DOE test procedure

apply to basic models of commercial refrigeration equipment with drawers, just as they do for CRE units with other types of hinged or sliding doors, and that the current energy conservation standards prescribed for commercial refrigeration equipment are equally applicable to CRE units with drawers.

To clarify how DOE's regulatory scheme applies to basic models of CRE units with drawers, in the October 2013 test procedure NOPR, DOE proposed to add language to the definition section at 10 CFR 431.62, defining doors as being inclusive of drawers, and requested comment on its proposed definition. 78 FR at 64301 (Oct. 28, 2013).

Several interested parties commented on DOE's proposed definition of door to include drawers, the applicability of the DOE test procedure to units with drawers, and DOE's coverage of units with drawers in general. DOE presents the comments received by interested parties and DOE's response in the following sections.

Definition of Door

In the October 2013 test procedure NOPR, DOE defined door at 78 FR 64301 (Oct. 28, 2013).

DOE received several comments and suggestions from interested parties regarding its proposed definition for doors. Continental commented that DOE's definition of "door" should not include drawers. Continental stated that it is counter-intuitive to define a "drawer" as a subset of a "door" and this would result in confusion and misinterpretation and suggested that, instead, DOE change the usage of the term "door" in applicable procedures to "door or drawer." (Continental, No. 14 at p. 1) AHRI did not agree with DOE's proposed definition of "door" to be inclusive of drawers and instead suggested that DOE create separate definition for drawers or amending the current definition for "doors" by replacing "door" with the term "door/drawer." (AHRI, No. 15 at p. 3)

NEEA, AHRI, Southern Store Fixtures, and True commented that DOE's definition of doors would include night curtains and recommended that DOE include a specific exclusion of night curtains in the definition of doors. (NEEA, No. 16 at p. 2; AHRI, No. 15 at p. 4; Southern Store Fixtures, Public Meeting Transcript, No. 7 at p. 32; True, Public Meeting Transcript, No. 7 at p. 37) Several interested parties, including NEEA, Traulsen, True, Southern Store Fixtures, and Unified Brands, recommended that DOE remove the "use of tools" clause from the definition, as most drawers and some doors are intended to be removed without the use of tools. (NEEA, No. 16 at p. 2; Traulsen, No. 17 at p. 2; True, Public Meeting Transcript, No. 7 at p. 37; Southern Store Fixtures, Public Meeting Transcript, No. 7 at p. 37; Unified Brands, No. 9 at p. 1)

DOE appreciates the suggestions of interested parties regarding changes and improvements to DOE's proposed definition for door. DOE agrees with interested parties that a night curtain would have met the definition of "door" proposed in the October 2013 test procedure NOPR. This was not DOE's intent, as night curtains are intended to be treated as an energy-saving feature for open cases. DOE also adopted a specific definition for night curtain in the 2012 test procedure final rule. 77 FR at 10318 (Feb. 21, 2012). To clarify that night curtains are not to be treated as doors for the purposes of testing using the DOE test procedure or complying with DOE's energy conservation standards, in this final rule DOE is adding language to the definition of "door" to exclude night curtains.

DOE also acknowledges comments submitted by interested parties regarding the requirement that a door be "affixed such that it is not removable without the use of tools." DOE's intent with the proposed clause was to exclude temporary insulating panels or other devices that are not doors, but may be placed on open cases periodically to limit energy consumption when the case is not in use for merchandizing. DOE agrees with commenters that some doors and drawers are intended to be removable without the use of tools for the ease of cleaning, product loading, or other utility features, and that these cases should still be treated as closed cases with doors. Therefore, in the definition of "door" adopted in this final rule, DOE is removing the "use of tools" provision. Upon further consideration, DOE found the statement to be superfluous. This does not include night curtains or other panels that are not in place when the case is being used for merchandising.

Regarding the inclusion of drawers in DOE's definition of "door," DOE acknowledges the concerns of interested parties that referring to drawers as doors in the test procedure for commercial refrigeration equipment may be confusing and non-intuitive. However, DOE's test procedure for commercial refrigeration equipment only addresses the treatment of "doors" and does not explicitly reference the treatment of "drawers." This terminology is established in ASHRAE Standard 72–2005, the method of test referenced in AHRI 1200–2010, the test procedure incorporated by reference as the foundation of DOE's test procedure for commercial refrigeration equipment. Given that the nomenclature in these referenced test standards is not the sole purview of DOE, DOE believes the most straightforward method for clarifying that the treatment of drawers should be identical to the treatment of doors for the purposes of conducting the DOE test procedure and compliance with DOE's energy conservation standards is to continue to define door as inclusive of drawers, as proposed in the October 2013 test procedure NOPR. 78 FR at 64301 (Oct. 28, 2013). However, if the ASHRAE Standard Project Committee were to revise ASHRAE Standard 72–2005 to include drawers specifically, DOE could review and incorporate the revised test standard, if appropriate, to further eliminate confusion. DOE understands that this may occur in a forthcoming version of ASHRAE Standard 72, anticipated to be published in 2014. Until such a revised test standard is available, DOE will also incorporate language into the test procedure at 10 CFR 431.64 to specify that drawers are to be treated as identical to doors when conducting the DOE test procedure.

Applicability of the DOE Test Procedure to Commercial Refrigeration Equipment With Drawers

Several interested parties commented that the current DOE test procedure for commercial refrigeration equipment does not provide sufficient clarity regarding how to test units with drawers. Specifically, commenters identified (1) the type and configuration of drawer pans, (2) the location and number of simulators and test packages in the drawers, (3) how to determine interior refrigerated volume of a drawered unit, and (4) how far a drawer should be opened during testing as areas of ambiguity when applying the existing DOE test procedure to CRE models with drawers. (Unified Brands, No. 9 at p. 2; Traulsen, No. 17 at p. 2; National, Public Meeting Transcript, No. 7 at p. 42) Unified Brands and Traulsen commented that, depending on the design of the drawer unit, moving the test simulators in and out of the refrigerated compartment may cause variation in the integrated average temperature (IAT), which could drive increased energy consumption, and added that testing of commercial refrigeration equipment with doors does not require test simulators to be removed from the refrigerated compartment. (Unified Brands, No. 9 at p. 2; Traulsen, No. 17 at p. 2) Specifically, National opined that when calculating total volume of a drawered

unit, there should be considerations for drawer pan capacity. Additionally, National urged DOE to center the definition of a unit's volume on the amount of product that the unit can hold. (National, Public Meeting Transcript, No. 7 at p. 42)

Unified Brands commented that it is inappropriate for a drawer to be included as equivalent to a door for the purposes of testing and compliance with the DOE test procedure and energy conservation standards because when a drawer is opened, the entire contents of the drawer are removed from the interior volume of the cabinet and exposed to the ambient conditions. In addition, Unified Brands stated that it manufactures drawer units in which the drawer is fully insulated refrigerated space and the cabinet is mostly structural. Unified Brands further commented that drawer units are often designed with additional refrigeration capacity beyond that of a similarly sized door unit due to the unique air flow and refrigeration challenges that drawers provide. (Unified Brands, No. 9 at pp. 1–2)

Lastly, Unified Brands commented that current CRE models may require as many as 12 separate drawer openings, requiring 12 door-opening apparatus, the electronic capability to control all of the openers, and a significant amount of space. Unified Brands added that testing equipment with drawers also increases burden by increasing the complexity of the test and increasing the risk associated with managing thermocouple wires to prevent thermocouple displacement and breakage. (Unified Brands, No. 9 at pp. 2–3) Unified Brands was also concerned that multiple thermocouple wires may prevent the drawer gaskets from sealing properly, resulting in increased energy use. (Unified Brands, No. 9 at p. 2)

Based on comments received by interested parties, DOE reviewed its test procedure for commercial refrigeration equipment with regards to specific requirements necessary to accommodate or clarify the application of the CRE test procedure to equipment with drawers. The DOE test procedure for commercial refrigeration equipment adopts specific sections of the Association of Home Appliance Manufacturers Standard for Energy, Performance and Capacity of Household Refrigerators, Refrigerator-Freezers and Freezers (AHAM HRF–1–2004) as the protocol for determining refrigerated compartment volume for compliance with the current standards and specific sections of AHAM HRF–1–2008 for measuring refrigerated compartment volume to determine compliance with the amended standards adopted in the March 2014 energy conservation standard final rule. 79 FR 17726 (Mar. 28, 2014). DOE reviewed these methods for determining refrigerated compartment volume and finds them sufficient for determining internal refrigerated volume for commercial refrigeration equipment with drawers.

With regard to the comment from Unified Brands about a model of commercial refrigeration equipment in which the drawers are insulated and the outer case acts more as a support, DOE researched this type of commercial refrigeration equipment and reviewed the applicable methods for calculating refrigerated or frozen compartment volume. DOE specifically references section 3.21, "Volume," of AHAM HRF 1–2004 and section 3.30, "Volume," of AHAM HRF 1–2008. Both of these sections contain definitions for "fresh food compartment volume" and "freezer compartment volume," which are defined as the portion of the total refrigerated volume above or below 32 °F, respectively. The total refrigerated volume is a combination of these two compartment volumes. Based on these definitions, DOE believes that only the volume that is purposefully refrigerated for food display or storage is to be included in the refrigerated volume calculation. Thus, in the case of a drawered CRE model in which only the drawers are insulated and directly cooled, only the interior volume of the drawers would be included in the calculation of refrigerated volume, not the entire volume of the cabinet housing. DOE believes that this is clear in the existing protocol specified in AHAM HRF 1–2004 and AHAM HRF 1–2008 and further clarification is not necessary on this matter.

Regarding test simulator locations, filler package placement, and pan configuration for CRE models with drawers, DOE reviewed the ASHRAE Standard 72–2005, which is the industry standard referenced by the DOE test procedure, to determine the sufficiency of existing guidance for placing test simulators and filler packages in commercial refrigeration equipment with drawers. ASHRAE Standard 72–2005 specifically addresses CRE models with shelves and without shelves and, in general, specifies that test simulators shall be placed at the right end, front and back, and the left end, front and back. Test simulators are also to be placed intermittently across the face of CRE model at shelf standard breaks or with specific spacing in the case of CRE models without shelving. Since CRE models with drawers typically do not have shelves, these models will be treated as CRE models without shelves. Therefore, applying the requirements for CRE models without shelves to CRE models with drawers, it is logical that test simulators should be placed in the front and back corners of the drawer and, depending on the width of the drawer, 36- to 48-inch intervals across the width of the drawer in the front and back, as is the case for commercial refrigeration equipment without shelves. DOE does not see a problem applying the requirements for a CRE model without shelves in ASHRAE Standard 72–2005 to a CRE model with drawers, which qualifies as a CRE model without shelves, and believes placing test simulators in this manner will accurately and representatively capture the internal temperature of the equipment.

With regard to filler package placement, ASHRAE Standard 72–2005 specifies that the remaining usable space where test simulators are not required shall be loaded with filler packages or filler material so as to occupy between 70 and 90 percent of the refrigerated volume and to uniformly occupy the space from the front to the rear. Again, DOE does not anticipate issues in applying these requirements to CRE models with drawers just as they are applied to CRE models with doors. In the case of CRE models with drawers, each drawer should be filled with filled packages or filler material up to the load limit. DOE acknowledges that it is theoretically possible that the drawers could hold less than 70 percent of the net refrigerated volume if the entire cabinet was refrigerated. However, DOE notes that this would be an inefficient design choice and DOE does not see a significant utility associated with having significant amounts of unusable refrigerated volume. Therefore, DOE does not believe accommodation is necessary for such situations. If a manufacturer produces a case that cannot meet the requirements of 70 percent packing, that manufacturer must apply for a test procedure waiver.

As to the pan configuration necessary for testing CRE models with drawers, DOE understands that CRE with drawers often consist of a sliding frame that accommodates the placement of standard size pans typically used by the food service industry for holding food. DOE acknowledges that theoretically many configurations of pans could be placed in a commercial refrigerator or freezer with drawers. DOE's test procedure requires that the model be configured with a pan configuration that allows for the maximum packing of filler packages as specified by the test

procedure, but not exceeding 90 percent of the refrigerated volume. To clarify this requirement, DOE is adopting language to specify that commercial refrigeration equipment with drawers should be configured with the drawer pans that allow for the maximum packing of test simulators and filler packages without exceeding 90 percent of the refrigerated volume.

In response to the Unified Brands comment regarding the burden of conducting the test procedure for commercial refrigeration equipment on equipment with drawers, DOE does not believe that the requirements are significantly more complex than those for testing commercial refrigeration equipment with doors. Numerous door-opening apparatus are also required for multi-compartment doored cases, and thermocouples must also be configured so as to measure test simulators in the internal refrigerated volume. DOE acknowledges that incrementally more thermocouple wire may need to be attached to thermocouples placed in test simulators in drawers, to ensure sufficient slack is available for the drawer to fully open and fully close without disturbing the thermocouple placement within the test simulator. However, DOE does not believe that providing this additional length of thermocouple wire is a significant additional burden, given many test simulators may already be equipped with excess thermocouple wire.

General Treatment of Drawers as Equivalent to Doors

In response to the October 2013 test procedure NOPR, DOE also received several comments from interested parties regarding the appropriateness of treating drawers as equivalent to doors for the purposes of testing under DOE's test procedure for commercial refrigeration equipment and compliance with DOE's energy conservation standards in general. DOE presents these comments and DOE's response in this section.

Traulsen commented that units with drawers typically hold less product by mass and volume than an identical unit with doors only and questioned how this will affect the IAT and the infiltration of air during the door/drawer opening period. (Traulsen, No. 17 at p. 2) According to Unified Brands, many drawer units are specifically designed for drawers and do not have a door unit of similar construction for comparison and, prior to assuming similarity between door and drawer units, a statistically significant sample of product designs should be tested and validated. (Unified Brands, No. 9 at pp. 1–2)

DOE's test data, presented in the October 2013 test procedure NOPR, does not suggest that drawers are significantly different from doors in terms of applying the DOE test procedure or the thermodynamic requirements. 78 FR at 64301 (Oct. 28, 2013). Lacking additional data contradicting DOE's test data, DOE is maintaining its position that drawers are to be treated as equivalent to doors for the purposes of conducting the DOE test procedure and complying with DOE's energy conservation standards.

b. Transparent and Solid Doors

In reviewing the CRE test procedure, DOE identified opportunities for clarification within the definitions and classifications of commercial refrigeration equipment with solid doors versus those with transparent doors. In the October 2013 test procedure NOPR, DOE proposed several new definitions for transparent, closed solid, and closed transparent to clarify the test procedure requirements at 10 CFR 431.64 to ensure appropriate equipment categorization. 78 FR at 64301–64303 (Oct. 28, 2013).

Definition of Transparent

The DOE test procedure for commercial refrigeration equipment, as amended by the 2012 test procedure final rule, incorporates by reference AHRI 1200–2010. 77 FR at 10318 (Feb. 21, 2012). AHRI 1200–2010 defines total display area (TDA) as "the sum of the projected area(s) for visible product expressed in [square feet]" and provides procedures for calculating the TDA of commercial refrigeration equipment with panels, end enclosures, doors, or other envelope components that have some transparent area(s). Appendix D of AHRI 1200–2010 provides further guidance and examples to clarify the calculation of TDA. The appendix also defines a transparent material as that which allows at least 65 percent light transmittance. Therefore, based on AHRI 1200–2010, a transparent door would be one partially or entirely composed of a material that allows greater than or equal to 65 percent light transmittance.

In the October 2013 test procedure NOPR, DOE proposed a definition for "transparent" based on an unambiguous measurement of the light transmission properties of a material in accordance with ASTM Standard E 1084–86 (Reapproved 2009), "Standard Test Method for Solar Transmittance (Terrestrial) of Sheet Materials Using Sunlight," at normal incidence. 78 FR at 64301–64302 (Oct. 28, 2013).

In response to DOE's proposed definition of "transparent," several interested parties provided comments and suggestions for adopting an appropriate definition for commercial refrigeration equipment applications. Continental stated that DOE's proposed definition of "transparent" introduces unnecessary complexity and suggested that a simple dictionary-type definition as "able to [be] seen through" would be sufficient for nearly all applications for covered commercial refrigeration equipment. Continental added that DOE has the right and obligation to challenge a manufacturer's claim if DOE believes it does not meet a basic definition of the terminology or the intent of the standard. (Continental, No. 14 at p. 1) NEEA, True, and Hussmann were concerned that DOE's proposed threshold of 65 percent light transmittance might inadvertently exclude some types of Low-E, high performance glass, which can have visible transmittance as low as 45 percent. (NEEA, No. 16 at p. 2; True, Public Meeting Transcript, No. 7 at p. 53; Hussmann, No. 11 at p. 1) NEEA and Hussmann recommended DOE consider lowering the threshold for determining whether a material is transparent or not, and suggested that DOE possibly refer to the WINDOWS 5 model, developed by Lawrence Berkeley National Laboratory,[7] that was used in the engineering analysis. (NEEA, No. 16 at p. 2; Hussmann, No. 11 at p. 1)

True and Southern Store Fixtures noted that self-serve counter display cases may be fitted with see-through mirror-finish, or glass reflective panels, which would affect the transparency of the doors depending on the measurement angle and direction. (Southern Store Fixtures, Public Meeting Transcript, No. 7 at p. 53; True, Public Meeting Transcript, No. 7 at p. 55)

True also noted that the majority of losses through transparent doors were a result of the difference in insulation capacities between the glass door and the solid door, and that only a small portion of the losses were due to light entering through transparent doors. True therefore opined that treating a glass door as solid, irrespective of its transparency, was inaccurate. (True, Public Meeting Transcript, No. 7 at p. 51)

DOE appreciates the suggestions by commenters. In response to Continental's concern regarding the potential complexity of a quantitative method for determining a transparent

[7] *http://windows.lbl.gov/software/window/window.html.*

material, rather than a definition based on the intent or application of the material, DOE notes that the method to determine transparency of a material is not mandatory for equipment classification or testing. In the October 2013 test procedure NOPR, DOE noted that determination of the light transmittance of a transparent material is not required in all cases to classify a basic model of commercial refrigeration equipment as equipment with transparent doors and clarified that manufacturers may continue to specify equipment as belonging to a transparent equipment class (*e.g.*, vertical closed transparent or horizontal closed transparent) or a solid without testing because, in most cases, it will be obvious whether a material is transparent or not; therefore, testing would not be necessary to verify the classification of a material as transparent or not. 78 FR at 64302 (Oct. 28, 2013). Thus, incorporation of a quantitative test procedure is not anticipated to add to the complexity and burden of conducting the DOE test procedure for most models of commercial refrigeration equipment.

DOE agrees with Continental that DOE has the obligation and the right to challenge the classification of certain materials as transparent. However, there may be cases in which the material is not obviously transparent or solid, such as basic models with special decals or opaque glass. DOE prefers to use a quantitative, objective method to determine transparency of a material and subsequent equipment classification, which will also provide certainty to the regulated industry. Therefore, DOE is adopting in this final rule a definition of "transparent" based on the evaluation of that material in accordance with ASTM Standard E 1084–86 (Reapproved 2009).

In response to the comments from NEEA, True, and Hussmann expressing concern about the inclusion of Low-E and high performance glass as a "transparent" material when such fenestration products may have visible transmittance values as low as 45 percent, DOE researched available high performance glass door products for commercial refrigeration equipment to determine an appropriate threshold for light transmittance. While some Low-E glass with reflective coatings designed for extremely sunny environments can have visible transmittance values as low as 0.2 (meaning 20 percent transparent), DOE finds that it is unlikely commercial refrigeration equipment would incorporate such material since this equipment is not typically installed in extremely sunny environments. In addition, such a low visible transmittance value would significantly diminish the ability of consumers to see through the glass to the contents inside the unit, which is the intent of including transparent material in a given CRE design. Therefore, DOE is adopting a threshold for determining a transparent material of 45 percent light transmittance as determined in accordance with ASTM Standard E 1084–86 (Reapproved 2009).

Regarding comments by True and Southern Store Fixtures, DOE acknowledges that some glass may be available with a mirrored finish to prevent viewing or light transmittance when viewed from one side of the glass, but not the other. DOE does not intend to treat such glass as solid, as it provides the function of transparent material (*i.e.*, being able to see through to the internal contents of the case) when viewed from one side of the glass. In the equipment described by commenters, this would be when viewed at an angle of incidence normal (90 degrees) to the plane of the case and from the exterior. DOE believes that reflective glass would fully meet the definition of "transparent" when tested at normal incidence and in the intended direction of viewing. Therefore, to clarify the orientation of glass when testing using ASTM Standard E 1084–86 (Reapproved 2009), DOE is incorporating language into the definition of "transparent" to specify that the material is to be tested at normal incidence and in the intended direction of viewing.

Definition of Equipment With Transparent Doors Versus Solid Doors

In the energy conservation standards specified at 10 CFR 431.66, DOE refers to equipment families using the terms "closed solid" and "closed transparent" (for example, vertical closed solid (VCS) and vertical closed transparent (VCT)). In the October 2013 test procedure NOPR, DOE proposed definitions for "closed transparent" and "closed solid" to clarify what factors differentiate a CRE basic model as a transparent door model or a solid door model. DOE based its proposed definitions on a percentage of outer surface area of all doors that are transparent. Specifically, DOE proposed that if 75 percent or more of the outer surface area of all doors on a CRE unit is transparent, that unit would be considered closed transparent. Conversely, DOE proposed that "closed solid" would refer to CRE equipment with doors, and in which more than 75 percent of the outer surface area of all doors is not transparent. 78 FR at 64318 (Oct. 28, 2013). As DOE presented at the December 2013 test procedure NOPR public meeting, DOE intended for the definition of "closed solid" to include equipment in which more than 25 percent of the outer surface area of all doors on a unit are not transparent, and notes that the inclusion of the 75 percent figure in the October 2013 test procedure NOPR was a typographical error.

DOE received several comments from interested parties in response to the categorization of closed transparent versus closed solid equipment families proposed in the October 2013 test procedure NOPR. Hill Phoenix, AHRI, and Hussmann commented that a case that has a transparent door on the front and a solid door on the side or back, where approximately 50 percent of the door surface area is transparent and approximately 50 percent of the door surface area is solid, was not adequately addressed by DOE's proposed definitions. Hill Phoenix, AHRI, and Hussmann further suggested that a CRE model where 25 percent or more of the outer surface area of all doors on the unit are transparent should be treated as a transparent case and that any case that has more than 75 percent of the door area as solid should be subject to the closed solid energy conservation standards. (Hill Phoenix, No. 13 at p. 2; AHRI, No. 15 at p. 4; Hussmann, No. 11 at p. 2)

Continental commented that DOE's proposed definitions do not correlate with the way commercial refrigeration systems are typically designed for units with transparent doors. Continental further commented that if more than 25 percent of the doors on a unit are transparent, the refrigeration systems are commonly "upsized" to provide the increased cooling capacity required. Thus, Continental suggested that DOE's definition should align with industry practice and adopt a 25 percent threshold or, at most, a 32 percent level. (Continental, No. 14 at p. 2)

Traulsen recommended that the definition of "closed transparent" refer to CRE models in which 75 percent or more of the transparent area of the doors on the customer side of the pass-through or the operator/customer side of the reach-in[8] style unit is transparent, and "closed solid" be defined as equipment in which more than 75 percent of the outer surface area of all the doors on each side of the unit is not transparent. Traulsen added that transparent doors and the design and operation of closed transparent equipment carry a higher

[8] The comment submitted by Traulsen referenced "read-in" style units. DOE believes Traulsen meant to reference "reach-in" style units and has amended the submitted comment to reflect this.

energy penalty and DOE should be cautious of creating definitions that classify equipment with transparent doors as closed solid equipment. Traulsen further recommended ignoring other doors on the backside of the unit when classifying closed transparent equipment, similar to the treatment of pass-through-type equipment in ASHRAE Standard 72–2005, where only doors on the one side of the pass-through should be operated during the test. (Traulsen, No. 17 at p. 2)

Hussmann suggested that DOE further clarify what "the outer surface area of the door" is and whether it includes mullions and door frames. (Hussmann, No. 11 at p. 2)

Alternatively, Zero Zone offered that the ENERGY STAR® [9] program uses definitions that describes a number of additional details about glass door equipment and recommended that DOE should consider these definitions. For example, Zero Zone stated that it manufactures a CRE model with transparent doors on the front and solid doors on the back, and that the ENERGY STAR definitions would classify such a case as a glass door cabinet and DOE's proposed definitions would qualify such as case as a solid door cabinet. In addition, Zero Zone suggested that DOE perform an engineering analysis to assess the impact and feasibility of reduced energy conservation standard levels for closed transparent equipment with a small percent of transparent area. (Zero Zone, No. 18 at pp. 1–2)

In response to comments regarding the fraction of transparent surface area of all outer doors on a given CRE model that differentiates closed transparent equipment from closed solid equipment, DOE acknowledges comments from interested parties regarding the increased energy use associated with closed transparent equipment due to the increased thermal conductance of glass as compared to insulated case walls and other design and operation features. In determining the fraction of transparent door surface area to qualify a basic model of commercial refrigeration equipment as equipment with transparent doors, DOE proposed a transparent surface area higher than 50 percent to ensure that only doors with a majority of transparent surface area were considered transparent doors. 78 FR at 64302 (Oct. 28, 2013). However, DOE finds the suggestions of Traulsen, Hill Phoenix, AHRI, and Hussmann—that equipment with transparent doors on one side of the cabinet and solid doors on another be treated as transparent equipment—reasonable and consistent with DOE's intended application of closed transparent equipment. That is, equipment with only one transparent door and the remaining sides consisting of solid insulated case wall and similar equipment with two doors, one that is transparent and one on another side that is solid, should be treated equivalently for the purposes of testing and compliance with DOE energy conservation standards. However, DOE finds the suggestion of Traulsen to address only the customer side of a CRE model to be inconsistent and impractical to implement given the variety of door configurations that could be present on other sides of the CRE unit. DOE believes it is most appropriate to address the outer surface area of all the doors that may be present on any of the sides of a CRE model when determining whether the equipment belongs in the closed solid or closed transparent equipment family.

Regarding Hussmann's request that DOE provide additional clarity as to the definition of "outer surface area," DOE used the term "outer surface area" to refer to the surface area on only one side of a door. DOE acknowledges that solid and transparent doors installed on commercial refrigeration equipment are physically three-dimensional objects, with surface area measurements on each of six sides: Four edges and two faces. DOE used the term "outer surface area" to refer to the side of the door facing out of, rather than into, the cabinet. In response to Hussmann's comment inquiring whether the outer surface area of the door included mullions and door frames, DOE is clarifying that the outer surface area to be accounted for is that of the door itself, as defined in section III.A.2.a, as a unique component of the CRE model. In this case, the door consists of the door frame and any transparent area that represents the "moveable panel" that "facilitates access to the refrigerated space." This would not include mullions, which are fixed portions of the CRE model's envelope on which the doors are mounted. DOE has specified how to determine the applicability of transparent equipment families to a given model in section 1.2 of each appendix.

In response to Zero Zone's suggestion that DOE consider the ENERGY STAR® definitions for solid door cabinet, glass door cabinet, and mixed solid/glass door cabinet, DOE reviewed the definitions in the ENERGY STAR "Version 2.1 Program Requirements for Commercial Refrigerators and Freezers" [10] (Version 2.1 Program Requirements), as well as associated stakeholder comments received during the development of the ENERGY STAR Version 2.1 Program Requirements in developing the proposed definitions for closed solid and closed transparent.[11] The primary difference between the ENERGY STAR classification scheme and that proposed by DOE is the treatment of CRE models with mixed solid and transparent doors on at least one side of the unit. In DOE's proposal, cases with mixed solid and transparent doors would be treated as either solid or transparent cases, based on the outer surface area of the doors, whereas ENERGY STAR treats this equipment in a separate equipment category.

DOE believes the definitions proposed in the October 2013 test procedure NOPR are straightforward and would unambiguously address equipment categorization. 78 FR at 64318 (Oct. 28, 2013). In addition, setting the threshold for transparent surface area of all outer doors at greater than 25 percent makes it unlikely that equipment with substantial amounts of transparent area will be categorized in the closed solid equipment family. For example, equipment that has one door that is half transparent and half-solid would be treated as "closed transparent" and would have to meet the energy conservation standard for the appropriate equipment class based on its volume or TDA. As a result, DOE

[9] ENERGY STAR is a joint program of the U.S. Environmental Protection Agency and DOE that establishes a voluntary rating, certification, and labeling program for highly energy efficient consumer products and commercial equipment. Information on the program is available at *www.energystar.gov/index.cfm?c=home.index.*

[10] U.S. Environmental Protection Agency. *ENERGY STAR® Program Requirements for Commercial Refrigerators and Freezers: Eligibility Criteria; Version 2.1.* Effective January 1, 2010. (Last accessed August 15, 2013.) *http://www.energystar.gov/ia/partners/product_specs/program_reqs/Commercial_Refrigerator_and_Freezer_Program_Requirements.pdf?dae6-ef7c.*

[11] *See* Continental Refrigerator, Comments on Specification for Commercial Refrigerators and Freezers, Version 2.0 Draft 3. Dated January 7, 2009. Available at: *https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/Continental_Comments.pdf?f45c-2369.* Beverage-Air Corporation, Beverage-Air Comments re: ENERGY VERSION 2.0—DRAFT 3, Dated January 8, 2009. Available at: *https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/Beverage-Air_Comments.pdf?f45c-2369.* Anonymous, Comments on Draft 2. Dated September 15, 2008. Available at: *https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/Anonymous_Comments.pdf?f45c-2369.* True Manufacturing, Comments on Draft 2. Dated September 17, 2008. Available at: *https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/True_Comments.pdf?f45c-2369.* Traulsen, Comments on Draft 1. Dated April 18, 2008. Available at: *https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/Traulsen_Comments.pdf?f45c-2369.*

does not anticipate issues associated with equipment with small transparent areas that cannot meet the applicable energy conservation standard. Also, these definitions are consistent with the equipment categorization methodology DOE uses to establish standards for covered equipment. As such, DOE believes defining terms that are used directly in the description and determination of equipment classes for commercial refrigeration equipment is the most clear, unambiguous method for defining and categorizing equipment as closed transparent or closed solid, and DOE does not see a need to establish a unique equipment category for mixed solid/transparent equipment.

c. Hybrid Equipment and Commercial Refrigerator Freezers

At 10 CFR 431.62, DOE defines a commercial hybrid refrigerator, freezer, or refrigerator-freezer as having two or more chilled and/or frozen compartments that are in two or more different equipment families, contained in one cabinet, and sold as a single unit. In the October 2013 test procedure NOPR, DOE proposed to replace the definition of "commercial hybrid refrigerator, freezer, and refrigerator freezer" with a definition of "commercial hybrid," and introduce a new definition of "commercial refrigerator-freezer" to clarify DOE's definitions and equipment categories. 78 FR at 64303–64304, 64318 (Oct. 28, 2013).

In response to the definitions proposed in the October 2013 test procedure NOPR, DOE received comments from interested parties regarding DOE's definition for commercial hybrid and the applicability of the definition of commercial hybrid to certain equipment. Continental commented that the proposed definition of "commercial hybrid" should specify that the "two compartments" are separated by an insulated partition to isolate them for different storage applications, as this would limit confusion with multiple section cabinets, which may have non-insulated partitions or ducting between them purely for air distribution, shared throughout the entire unit. (Continental, No. 14 at p. 2)

True noted that DOE's definition did not explicitly state that dual temperature units were separated by a vertical partition, and therefore might include solid-shelf units. (True, Public Meeting Transcript, No. 7 at p. 71) Similarly, National expressed confusion over the application of the DOE rule in cases where two sections of a unit were at different temperatures, but potentially use the same evaporator coil or share air between the two spaces. (National, Public Meeting Transcript, No. 7 at p. 75) National commented that some two-door units are built with airflow down the middle and panels with louvers to distribute air. (National, Public Meeting Transcript, No. 7 at p. 79)

Hussmann agreed with DOE's proposed definitions of commercial hybrid and commercial refrigerator-freezer, but requested clarification on how to classify or handle a piece of equipment that contains at least one section or compartment that is not covered by the DOE test procedure (*e.g.*, salad bars and buffet tables). (Hussmann, No. 11 at p. 2) Royston noted that in many hybrid units such as salad bars, it was unclear what percentage of the unit would be considered refrigerated. (Royston, Public Meeting Transcript, No. 7 at p. 82)

In response to Continental's suggestion that DOE consider specifying that the compartments in a commercial hybrid refrigerator, freezer, or refrigerator freezer be separated by an insulated partition or be thermally isolated from one another, DOE agrees that the intent of the commercial hybrid equipment provisions is to address equipment with thermally distinct compartments from different equipment families (*e.g.*, vertical closed transparent and vertically closed solid). As such, DOE is adopting language to specify that commercial hybrid equipment is equipment consisting of two or more thermally separated refrigerated compartments that are in two or more different equipment families that is sold as a single unit.

In regard to clarification on how to classify or handle a piece of equipment that contains at least one section or compartment that is not covered by the DOE test procedure (*e.g.*, salad bars and buffet tables), DOE clarifies that this type of equipment is not hybrid equipment because it does not consist of two or more different equipment families. Only the compartment(s) of the piece of commercial refrigeration equipment that is covered by one of DOE's existing equipment classes is included in DOE's equipment family definitions. The compartment that is not covered by DOE's existing standards for commercial refrigeration equipment is not included in DOE's equipment family definitions and, thus, such a unit would not meet the definition of commercial hybrid. Using the example presented in Hussmann's comment, consider a commercial refrigerator that contains one compartment that falls into the vertical closed solid equipment family and a thermally separate compartment that offers accessible refrigerated bins for the purposes of preparing sandwiches or holding buffet items. As presented in section III.A.1.a, sandwich prep tables and buffet tables are not currently regulated under DOE's existing energy conservation standards or subject to DOE's test procedure for commercial refrigeration equipment. As such, this CRE model would be covered under DOE's existing energy conservation standards as a commercial refrigerator in the vertical closed solid equipment family based on the refrigerated volume of only the refrigerated compartment comprising the vertical closed solid commercial refrigerator. This CRE model would be tested under the DOE test procedure for commercial refrigeration equipment as a commercial refrigerator, and the compartment containing the sandwich prep or buffet table bins would be disabled and not included in the determination of energy consumption for that equipment. If the same refrigeration system serves both compartments and the refrigeration of the sandwich/buffet compartment cannot be disabled, manufacturers may apply for a test procedure waiver for such equipment if the measured energy use would not be representative of the commercial refrigerator, freezer, or refrigerator-freezer portion of the CRE basic model.

3. Relationship Among Rating Temperature, Operating Temperature, and Integrated Average Temperature

Currently, the table at 10 CFR 431.66(d)(1) describing the energy conservation standards for equipment other than hybrid equipment, refrigerator-freezers, and wedge cases refers to the "rating temperature" and "operating temperature" of equipment, and the table describing the applicable test procedure for covered equipment at 10 CFR 431.64(b)(3) refers to the term "integrated average temperature." DOE defines "integrated average temperature" as "the average temperature of all the test package measurements taken during the test." 10 CFR 431.62.

In the October 2013 test procedure NOPR, DOE proposed explicit definitions for "rating temperature" as the IAT at which a model of commercial refrigeration equipment should be evaluated in accordance with the DOE test procedure, and "operating temperature" as the range of IATs at which the unit of commercial refrigeration equipment is capable of operating. In addition, DOE noted that while the operating temperature range

of equipment is used to establish the appropriate equipment class for CRE basic models based on the standards table at 10 CFR 431.66(d)(1), only the definition of "ice-cream freezer" explicitly identifies the appropriate operating range (*i.e.*, at or below −5 °F). 10 CFR 431.62 Therefore, DOE also proposed definitions of "commercial refrigerator" and "commercial freezer" that reference the operating temperature range of each category of equipment. 78 FR at 64303–64304, 64318 (Oct. 28, 2013).

In response to DOE's proposed definitions for commercial refrigerator, commercial freezer, and commercial refrigerator-freezer, Continental commented that the use of the term "capable of" introduced confusion and does not accurately reflect industry practices. Continental offered the example of a piece of equipment that is designed and marketed as a refrigerator, but includes an oversized refrigeration system that may be necessary to hold products at temperatures near 32 °F that would allow the refrigerator to be capable of operating below 32 °F in some applications, although it is not intended to be operated that way. As such, Continental suggested that DOE define the commercial refrigerator operating range as "all refrigerated compartments in the unit are designed, marketed or intended for operating at or above 32 °F." (Continental, No. 14 at p. 2) Similarly, Hussmann suggested DOE replace "capable of operating" with "designed, marketed, or intended to be operated by the manufacturer." (Hussmann, No. 11 at p. 2)

DOE acknowledges comments from interested parties, but notes that DOE prefers to have an objective method for determining coverage of equipment under DOE's equipment classes. DOE believes that relying on how a piece of equipment is "designed, marketed, or intended to be used" provides too much flexibility for manufacturers to specify how a CRE basic model is "intended to be used," without consideration of how the equipment actually can be used. As such, DOE maintains that, for self-contained equipment and remote equipment with thermostats, DOE will establish the operating range of equipment based on the operating temperatures the commercial refrigeration equipment is capable of maintaining. DOE will determine the operating range of covered equipment based on the maximum and minimum thermostat set points. However, DOE acknowledges that, for equipment with an operating temperature range that is primarily in, for example, the commercial refrigerator operating temperature range (*i.e.*, at or above 32 °F), but has a minimum operating temperature in the commercial freezer range slightly below 32 °F (*e.g.*, 30 °F), it may not be appropriate to require such equipment to be certified as both a commercial refrigerator and a commercial freezer. DOE believes that equipment should be categorized in the equipment class most representative of the operating temperature range of that equipment. As such, DOE is adopting a tolerance on the minimum and maximum IAT that categorizes equipment as a commercial refrigerator, commercial freezer, or commercial ice cream freezer. DOE believes a tolerance of ±2 °F would allow sufficient flexibility that equipment with an operating temperature range that is substantially representative of one equipment class, but with a minimum or maximum operating temperature that extends slightly into the operating temperature range of another equipment class, is not required to be certified in both equipment classes. This tolerance is also consistent with the tolerance on the rating temperatures for the relevant equipment classes. Therefore, in this final rule, DOE will establish in 10 CFR 431.66 operating temperature ranges of greater than or equal to 32 °F (±2 °F) for commercial refrigerators, less than 32 °F (±2 °F) for commercial freezers, and less than or equal to −5 °F (±2 °F) for ice cream freezers.

DOE acknowledges that for remote equipment the operating range of equipment could be much broader, as it is based on the operating parameters of the compressor system much more than the case design. Manufacturers may design a case that could optimize performance for operation as a freezer, but customers would be able to adjust the compressor operating characteristics to operate the case at refrigerator temperatures, even though it is not intended to be used that way. As such, in this test procedure final rule DOE adopts additional language to clarify that for remote condensing equipment, the operating temperature range is based on the range of IATs at which a piece of commercial refrigeration equipment is marketed, designed, or intended to be used. DOE does not see the need to establish such a definition for self contained equipment with thermostats and will maintain the definition of "operating temperature" proposed in the NOPR based on the IATs at which a piece of commercial refrigeration equipment is capable of operating.

Traulsen recommended changing all referenced temperature thresholds from 32 °F to 25 °F, since some equipment, including meat refrigerators, is intended to be operated as low as 25 °F. (Traulsen, No. 17 at p. 3)

In response to Traulsen's recommendation regarding establishing equipment categories based on operating ranges of greater than or equal to 25 °F for commercial refrigerators, below 25 °F for commercial freezers, and a combination of the two for commercial refrigerator-freezers, DOE believes that 32 °F is a more appropriate temperature threshold for differentiating chilled from frozen food storage equipment. Equipment that can operate at 25 °F is functionally a freezer, since food is primarily composed of liquid water and water freezes at 32 °F. In addition, an operating temperature threshold of 32 °F was determined in the 2009 CRE energy conservation standards final rule and has been in place historically for the purposes of compliance with those standards since January 1, 2012. 74 FR 1092, 1099–1100 (Jan. 9, 2009). DOE notes that the equipment mentioned by Traulsen, which operates both at or above 32 °F and below 32 °F, would qualify as both a commercial refrigerator and a commercial freezer and would have to be certified in both equipment categories. To the extent that the equipment was not able to reach the rating temperature for commercial freezers of 0 °F, the equipment would be tested at its LAPT for certification as a freezer.

In the October 2013 test procedure NOPR, DOE recognized that some basic models may have operating characteristics that include an operating temperature range that spans multiple equipment classes, and proposed language to clarify that equipment meeting the definition of multiple equipment classes when operated as intended by the manufacturer would have to be tested and certified as each of these equipment classes to demonstrate compliance with DOE's energy conservation standards. 78 FR at 64304 (Oct. 28, 2013).

Zero Zone and AHRI disagreed with DOE's proposal that the equipment capable of operating in two or more operating temperature ranges be tested and certified as complying with both equipment classes. Zero Zone and AHRI suggested that these cases be tested and certified at their lowest published operating temperature, which would be reflective of the highest energy use mode. (Zero Zone, No. 18 at p. 2; AHRI, No. 15 at p. 4) Zero Zone added that if DOE requires equipment to be tested at all the published operating temperature ranges, more complex controls may be required to reduce energy so the equipment can meet the energy conservation standards for both

equipment categories, and suggested that DOE consider the increased cost of these controls compared to the benefits to consumers. Zero Zone added that, in general, remote freezers can be operated inefficiently as a refrigerator by customer settings on the remote condensing unit, but added that it does not condone such operation. As such, Zero Zone suggested DOE use the term "marketed operating temperature" to avoid having equipment potentially tested at two different temperature classes because it can be operated at two or more temperature class operating ranges even though it is not designed for use in these operating temperature ranges. (Zero Zone, No. 18 at p. 2)

In contrast, NEEA supported DOE's proposal that equipment intended to operate in multiple equipment classes be tested and certified in each equipment class to demonstrate compliance with DOE's energy conservation standards because NEEA believed it will allow a level playing field for manufacturers to produce energy compliant refrigeration equipment. (NEEA, No. 16 at p. 2)

DOE considered comments submitted by interested parties regarding the potential for commercial refrigeration equipment classified into two equipment categories. Zero Zone and AHRI both suggested that equipment instead be deemed compliant based on testing and certification in the more-stringent configuration or most energy-consuming mode. Zero Zone also discussed the example of a dual temperature unit that can operate as a commercial refrigerator or a commercial freezer. DOE notes that, while the freezer configuration would represent the most energy-consuming mode, determining the more-stringent standard level is less straightforward. Although the freezer configuration may use more energy, the energy conservation standard level for the refrigerator configuration may in fact be more stringent. This would especially be true if the operating range of the case was such that the CRE model could not be tested at the rating temperature of 0 °F for freezers. For example, in the case of a piece of commercial refrigeration equipment that has an operating temperature range of 10 to 50 °F, the unit can operate as a refrigerator, at or above 32 °F, or be converted to operate as a freezer, but only down to 10 °F. Thus, the unit cannot operate at the rating temperature for freezers of 0 °F and would be certified at the equipment's LAPT of 10 °F. However, the equipment, when tested at the LAPT, would still be subject to the same energy conservation standard and, as such, the freezer energy conservation standard would be much easier to meet.

In addition, rating the equipment as a freezer may or may not accurately represent the use of the equipment in the field. That is, dual temperature equipment may spend considerable operating hours as a refrigerator and less significant operating hours as a freezer. This may be the case in a commercial kitchen, for example, where freezer space is necessary at the beginning of the week when new product arrives, but is converted to refrigerator space over the course of the week as food is prepared and stored for more immediate use. DOE does not find it tenable that dual temperature equipment operating inefficiently as a refrigerator most of the time could be compliant with DOE's energy conservation standards due to its certification as a commercial freezer only.

DOE acknowledges Zero Zone's concern that equipment that can operate as a refrigerator or a freezer may require more-complex controls to meet DOE's energy conservation standards as both a refrigerator and a freezer. However, based on the difficulty in determining the "more-stringent" standard and the potential for certification of otherwise non-compliant equipment, DOE believes that this incremental burden is justified to ensure compliance with DOE's energy conservation standards. Further, DOE notes that equipment that can operate as both a refrigerator and a freezer competes directly with equipment in both categories and, as such, must be certified to meet the energy conservation standard for both equipment categories to provide a fair and level playing field when selling this equipment in the market.

In this test procedure final rule, DOE continues to require that self-contained equipment or remote condensing equipment with thermostats capable of operating at IATs that span multiple equipment categories be certified and comply with DOE's regulations for each applicable equipment category. Similarly, DOE adopts requirements for remote condensing equipment without a thermostat that specify that if a given basic model of CRE is marketed, designed, or intended to operate at IATs spanning multiple equipment categories, the CRE basic model must be certified and comply with the relevant energy conservation standards for all applicable equipment categories.

4. Proper Configuration and Use of Components or Features in the DOE Test Procedure

In response to several inquiries from interested parties regarding the proper configuration and use of certain components or features specified in the DOE test procedure, DOE proposed specific provisions in the October 2013 test procedure NOPR for the treatment of energy management systems and case lighting when conducting the DOE test procedure. 78 FR at 64304–64306 (Oct. 28, 2013). In addition, DOE also addressed and clarified the appropriate temperatures of test packages when loaded into the test unit. 78 FR at 64306 (Oct. 28, 2013). These proposals, comments received by interested parties, and DOE's responses are summarized in the subsequent sections.

a. Energy Management Systems

The DOE test procedure specifies that all devices that would normally be used in the field must be installed and operated in the same manner during the test unless such installation and operation is inconsistent with any requirement of the test procedure.[12] Such devices include energy management systems. In the October 2013 test procedure NOPR, DOE presented its interpretation of energy management systems as electronic devices that control specific systems in commercial refrigeration equipment to save energy, for example, automatic controls that are capable of turning off cabinet lights on a predetermined schedule or in response to an external variable, increasing the temperature setting of the thermostat (in refrigerators that store non-perishable items) during non-merchandizing hours, or activating and deactivating anti-sweat heaters, pan heaters, or defrost heaters. 78 FR at 64304 (Oct. 28, 2013).

In the October 2013 test procedure NOPR, DOE further proposed that, if normal field installation or operation of any device would be inconsistent with any test procedure requirement, then the specific function of that device that causes inconsistency with the DOE test procedure provisions must be disabled for the duration of the test. In addition, if the device is designed for multiple functions, only those functions of the device that cause inconsistency with the DOE test procedure requirements must be disabled. 78 FR at 64321 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of energy management systems during the DOE test procedure and, as such, is adopting the proposal presented in the October

[12] ASHRAE 72–2005, section 6.1.1, "Accommodation," as incorporated by reference into the DOE test procedure at 10 CFR 431.64

2013 test procedure NOPR with no modifications.

b. Lighting

The DOE test procedure specifies that all devices that would normally be used in the field must be installed and operated in the same manner during the test. 10 CFR 431.64. Specifically, due to language and provisions in ARI 1200–2006 (as incorporated by reference in the 2006 test procedure final rule) and AHRI 1200–2010 (as incorporated by reference in the 2012 test procedure final rule and this test procedure update) regarding case lighting, DOE believes that the energy consumption associated with lights installed on a model of commercial refrigeration equipment are intended to be captured during testing. In addition, the DOE test procedure requires that all standard components, such as shelves, end enclosures, lights, anti-condensate heaters, racks, and similar items that would normally be used during shopping or working periods, shall be installed and used as recommended by the manufacturer, which DOE interprets to mean that if lighting is installed on the case, the lighting should be operated as intended to be used in the field. However, due to the variety of types of lighting controls and schemes available on the market, the existing provisions for "accessories" may prove insufficient to yield consistent results during testing. Therefore, in the 2012 test procedure final rule, DOE established specific periods in the test during which these variable lights may be turned off or dimmed to account for energy savings due to installed occupancy sensors or scheduled lighting controls. 77 FR at 10319–10320 (Feb. 21, 2012).

In the October 2013 test procedure NOPR, to clarify the treatment of lighting under DOE's test procedure, DOE proposed to specify in Appendix A to Subpart C that all lighting must be energized to the maximum illumination level for the duration of testing for commercial refrigeration equipment except for closed solid models of commercial refrigeration equipment that include automatic controls that disable case lighting when the door is closed, the use of which is specified by the manufacturer instructions. DOE also proposed to specify in Appendix B to Subpart C, which will be required for equipment testing on or after the compliance date of any amended energy conservation standards, that case lighting shall be energized to its maximum illumination level except for when a model of commercial refrigeration equipment is equipped with lighting occupancy sensors and/or scheduled controls, or when the a model is outfitted with other permanently installed, automatic energy management systems that control case lighting. 78 FR at 64305–64306 (Oct. 28, 2013).

Zero Zone commented that they agree with DOE's proposed exception for solid door models that utilize an automatic control to disable case lighting when the door is closed. However, Zero Zone did not believe DOE's treatment of manual case lighting adjustment, such as light switches, is consistent with its treatment of manually deployable night curtains for open cases. (Zero Zone, No. 18 at p. 3) In addition, Zero Zone was concerned that an open case model with several lighting options would be tested with all lights installed for the test procedure, but the customer may choose to have a select amount of the lights on in the operation of the installed case. Zero Zone inquired if each lighting scheme in the open case model would be considered a base model and tested separately. (Zero Zone, Public Meeting Transcript, No. 7 at pp. 153–154) True commented that certain occupancy sensors with a learning curve built into them would not be able to be accurately tested since there is no activity near the unit during testing. True added that they can be programmed to override the sensor if needed. (True, Public Meeting Transcript, No. 7 at pp. 155–156)

DOE acknowledges Zero Zone's comment regarding the consistency of the DOE test procedure as it relates to the treatment of manual lighting controls and manual night curtains. DOE addressed this issue in the 2012 test procedure final rule, in which DOE stated that night curtains represent an incremental cost and explicit energy management feature that must be uniquely specified on commercial refrigeration equipment, making it unlikely that customers would purchase a case with night curtains and not employ them. By contrast, manual light switches may be installed for a variety of energy- or utility-related reasons and typically come standard on a baseline unit of commercial refrigeration equipment. As such, DOE finds it less likely that customers will employ manual light switches to adjust case lighting during unoccupied periods with any regularity. 77 FR at 10299–10300 (Feb. 21, 2012). DOE continues to maintain that the incremental cost of night curtains and dedicated use as an energy-efficiency feature make them unique from manual light switches and justify different treatment in the DOE test procedure.

In response to Zero Zone's comment regarding the variety of lighting options available for installation on a given model of commercial refrigeration equipment, DOE notes that these different lighting schemes will have an impact on the measured daily energy consumption of the case. As such, each light option could be treated as an individual basic model and be tested and certified as such. However, to the extent that manufacturers do not wish to account for the reduced energy consumption associated with reduced lighting configurations, all lighting configurations may be grouped into a CRE basic model. In this case, the CRE basic model would be tested and certified based on the lighting configuration with the maximum lighting energy usage and all individual models certified under that basic model would receive that rating.

In response to True's comment regarding lighting controls that are triggered by occupancy sensors, these lighting controls should currently be tested with all the controlled lighting turned on to the maximum illumination level and the occupancy sensor disabled to determine whether the model complies with existing energy conservation standards, as reflected in Appendix A. Beginning on the compliance date of any amended energy conservation standards for commercial refrigeration equipment, manufacturers shall use the prescribed test provisions for cases with lighting occupancy sensors included in Appendix B.

c. Test Package Temperature

The ASHRAE 72–2005 method of test, as referenced by ARI 1200–2006 and AHRI 1200–2010, and thus incorporated by the DOE test procedure at 10 CFR 431.64, provides specific instruction at section 6.2 as to the loading of test simulators and filler packages. ASHRAE 72–2005 also requires temperature stabilization before the formal test period begins, as detailed in section 7.4. After steady state operation is reached, the unit must then operate for another period of 12 hours without any adjustment to the controls before it is deemed to be stabilized and the testing can begin. These established stabilization requirements are designed to ensure that the product simulators and test packages are cooled to the test temperature prior to initiation of the test period and data collection, and the unit of commercial refrigeration equipment under test is not operating in a pull-down application during any part of the DOE test procedure.

In response to inquiries received by interested parties, DOE presented clarification of these stabilization requirements in the October 2013 test

procedure NOPR, but did not find that the test procedure required more explicit clarification. 78 FR at 64306 (Oct. 28, 2013). DOE did not receive any comments from interested parties on its proposal regarding treatment of test package temperatures during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

5. Treatment of Other Specific Equipment Features and Accessories During Testing

During the negotiated rulemaking for certification of commercial heating, ventilation, air conditioning, refrigeration, and water heating equipment, stakeholders raised a number of issues regarding the treatment during the DOE test procedure of specific features, components, and accessories that may be in place on certain basic models of commercial refrigeration equipment. In the October 2013 test procedure NOPR, DOE presented proposals that resulted from the negotiations regarding the treatment of specific features, components, and accessories. 78 FR at 64306–64308 (Oct. 28, 2013). The specific proposals and the resultant amendments adopted in this final rule are discussed in the following sections.

a. Customer Display Signs/Lights

Manufacturers stated that some customers, when ordering commercial refrigeration equipment, may wish to add additional exterior signage, outside of the body of the refrigerated cabinet, to certain units of a given model to advertise the product inside. This lighting and signage is optional and is not integral to the cabinet. Further, this auxiliary signage does not illuminate product inside the body of the cabinet. During the negotiations, stakeholders inquired regarding how this lighting or signage should be treated during testing.

In the October 2013 test procedure NOPR, DOE proposed that under the DOE test procedure, all lighting that is integral to the refrigerated cabinet or illuminates the product contained within must be operational during the test, and DOE proposed to add clarifying language in the regulatory text to address customer display signs/lights. Under DOE's proposal, supplemental lighting that exists solely for the purposes of advertising or drawing attention to the case and is not integral to the case would not be operated during testing under the DOE test procedure. 78 FR at 64306 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of customer display signs/lights during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

b. Condensate Pan Heaters and Pumps

Commercial refrigeration equipment captures water from the air entering the cabinet during operation by causing the water to condense and then freeze on the evaporator coil of the equipment. During a defrost cycle, this frost is melted and the meltwater produced must be removed from the unit. In many types of equipment, this meltwater is collected in a pan beneath the unit. Some models of commercial refrigeration equipment come equipped with electric resistance heaters that evaporate this water out of the pan and into the ambient air. Other models may come equipped with pumps that send meltwater to an external drain.

In the October 2013 test procedure NOPR, DOE proposed that, during the DOE test procedure, these electric resistance heaters and condensate pumps must be installed and operational during the entire test (as per section 6.1.1, "Accessories," of ASHRAE 72–2005) and clarified that the "entire test" includes stabilization (including pull-down), steady state, and performance testing periods. Prior to the start of the stabilization period, as defined by ASHRAE 72–2005, the condensate pan should be dry, and during the entire test following the start of the stabilization period, any condensate moisture generated should be allowed to accumulate in the pan as it would during normal operation, with no manual removal of water at any time during the entire test. DOE proposed that if a manufacturer offers a given basic model for sale with an available condensate pan heater or pump, the manufacturer must make representations of the performance of the basic model as tested with the feature in place, and DOE proposed clarifying language in the regulatory text to address condensate pan heaters and pumps. 78 FR at 64306 (Oct. 28, 2013).

In response to DOE's proposal in the October 2013 test procedure NOPR, AHRI, Hussmann, and Zero Zone commented that condensate pan heaters should not be required to be tested for remote equipment, since they are not accounted for in the energy conservation standard engineering analysis. (AHRI, No. 15 at p. 3; Hussmann, No. 11 at p. 4; Zero Zone, No. 18 at p. 2) AHRI commented that condensate pan heaters or pumps are usually added in the field to fulfill specific needs of commercial customers and are typically installed on less than 5 percent of the total remote cases sold within the U.S. AHRI further commented that it is unreasonable to require manufacturers to test potentially all remote equipment with condensate pan heaters to certify its basic models to DOE, if those models may be sold with condensate pan heaters in some specific applications. (AHRI, No. 15 at p. 3) Hussmann corroborated that remote equipment shipped with condensate pan heaters represents less than 1 percent of case volume for Hussmann and stated its belief that the discussions during the negotiated rulemaking (Docket No. EERE–2013–BT–NOC–0023) were primarily surrounding self-contained equipment. (Hussmann, No. 11 at p. 4)

Zero Zone added that if case manufacturers are deterred from supplying condensate pan heaters, end users will work around this by buying condensate pans from third parties that typically are not Underwriters Laboratories (UL) Recognized or UL Listed and do not come with protective covers. (Zero Zone, No. 18 at pp. 2–3)

DOE acknowledges the opinions of interested parties and agrees that condensate pan heaters and pumps are not common on remote equipment. As such, DOE agrees that determination of daily energy consumption for remote cases with condensate pan heaters may not be the most representative configuration. Thus, DOE is adopting language in this final rule applying the requirements for testing with condensate pan heaters and pumps in place for self-contained equipment only.

DOE notes that whether or not condensate pan heaters were included in DOE's engineering analysis and energy modeling to support standard development is not dispositive as to what features are included and accounted for when testing a given basic model of commercial refrigeration equipment. DOE models a representative model for each equipment class, but manufacturers may deviate from that assumed representative model in any number of ways, including the addition of features and accessories that improve the utility of cases in specific applications, such as condensate pan heaters and pumps.

c. Anti-Sweat Door Heaters

Many transparent-door cases come equipped with anti-sweat electric resistance heaters that serve to evaporate any water that condenses on the transparent surface of the door

during operation. In some instances, manufacturers may equip their cases with higher-powered anti-sweat heaters in anticipation of potential adverse operating conditions.

In the October 2013 test procedure NOPR, DOE proposed that anti-sweat heaters should be operational during testing under the DOE test procedure and proposed adding clarifying language in the regulatory text to address anti sweat door heaters. Models with a user selectable setting must be tested with the anti sweat heaters turned on and set to the maximum usage position and models featuring an automatic, non user adjustable controller that turns on or off based on environmental conditions must be tested with the controller operating in the automatic state. Additionally, DOE proposed that, if a unit is not shipped with a controller from the point of manufacture, and is intended to be used with a controller, the manufacturer must make representations of the basic model based on the rated performance of that basic model as tested when equipped with a controller intended by the manufacturer for use with the unit. 78 FR at 64306–64307 (Oct. 28, 2013).

NEEA stated that it supports DOE's proposal that anti-sweat heaters be in operation during testing unless controls are shipped with the unit and can be turned off by these controls during testing. (NEEA, No. 16 at pp. 2–3) DOE did not receive any negative comments from interested parties on its proposal regarding treatment anti-sweat door heater in the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

d. Ultraviolet Lights

Some manufacturers equip certain models of commercial refrigeration equipment with ultraviolet lights, which can be operated by end users to neutralize pathogens and ensure case cleanliness. Manufacturers inquired as to how these will be addressed by the DOE test procedure. In the October 2013 test procedure NOPR, DOE proposed that ultraviolet lights should not be turned on during the test procedure and proposed adding regulatory text to clarify this position. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of ultraviolet lights during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

e. Illuminated Temperature Displays and Alarms

Manufacturers may equip some commercial refrigeration equipment models with illuminated displays that provide visual information to the equipment operator regarding, for example, the temperature inside the refrigerated case or if the case temperature falls outside of a specified range. DOE understands these items to be features integral to the design of the given model and proposed that they should be enabled during the test as they would be during normal field operation. In the October 2013 test procedure NOPR, DOE proposed to add clarifying language in the regulatory text to address illuminated temperature displays and alarms. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of illuminated temperature displays and alarms during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

f. Condenser Filters

Manufacturers may offer models equipped with non-permanent filters over a model's condenser coil to prevent particulates such as flour from blocking the condenser coil and reducing airflow. In the October 2013 test procedure NOPR, DOE proposed that these filters should be removed during the DOE test procedure and proposed to add clarifying language as part of the regulatory text. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of condensate filters during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

g. Refrigeration System Security Covers

Manufacturers may offer for sale with a basic model an option to include straps or other devices to secure the condensing unit and prevent theft or tampering. In the October 2013 test procedure NOPR, DOE proposed that these security devices should be removed during testing under the DOE test procedure and proposed to add clarifying language as part of the regulatory text to clarify this provision. 78 FR 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of refrigeration system security covers during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

h. Night Curtains and Covers

Night curtains and night covers are defined at 10 CFR 431.62 as a device that is deployed temporarily to decrease air exchange and heat transfer between the refrigerated case and the surrounding environment. In the October 2013 test procedure NOPR, DOE stated that the proper treatment of these components during the DOE test procedure is discussed in the current text of the DOE test procedure, 10 CFR 431.64, as amended by the 2012 DOE test procedure final rule. DOE also added these provisions at section 1.2.10 in Appendix B and proposed adding language to clarify that night curtains may not be used when testing under Appendix A. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties regarding treatment of night curtains and covers during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

i. Grill Options

Manufacturers may offer for sale with a basic model optional grills that are used to direct airflow in unique applications, such as when a unit is mounted close to a rear wall and the airflow needs to be directed upwards. In the October 2013 test procedure NOPR, DOE proposed that, if present, non-standard grills should be removed during testing under the DOE test procedure and proposed to add clarifying language as part of the regulatory text. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of grill options during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

j. Coated Coils

Coated coils, generally specified for use in units that will be subjected to environments in which acids or oxidizers are present, are treated with an additional coating (such as a layer of epoxy or polymer) as a barrier to protect the bare metal of the coil from deterioration through environmental contact. In the October 2013 test procedure NOPR, DOE presented its belief that the existing DOE test procedure accurately accounts for the

performance of all types of coils, including those with coatings, and that no additional accommodations or clarifications are needed in the test procedure. Commercial refrigeration equipment with coated coils shall be tested in accordance with the DOE test procedure, as specified at appendices A and B to subpart C of 10 CFR part 431. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties regarding treatment of coated coils during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

k. Internal Secondary Coolant Circuits

The use of internal, secondary, working fluid that is cooled by a remote condensing unit is a proprietary design that purportedly allows for greater control of unit temperature, and may present other attributes desirable to a customer. In the October 2013 test procedure NOPR, DOE stated that it found no evidence indicating that this design could not be tested using the DOE test procedure as written, as the operation of equipment with internal secondary coolant circuits would be effectively the same as that of a standard remote condensing case from the perspective of the test procedure. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties regarding treatment of internal secondary coolant circuits during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

l. Wedge Cases

Wedge cases are models of commercial refrigeration equipment that fit between two other cases to fill a gap (such as in a corner) in a continuous case lineup. They may require air spillover from adjacent cases to meet the manufacturer's design temperatures. During the negotiation proceedings, manufacturers inquired as to how wedge cases should be treated under the DOE test procedure.

DOE considered the coverage and testing of wedge cases in the 2009 energy conservation standards final rule. 74 FR 1092, 1102–1103 (Dec. 9, 2009). Based on that assessment, DOE understands that wedge cases meet the definition of commercial refrigeration equipment and fall into existing CRE equipment classes. In the October 2013 test procedure NOPR, DOE stated that it is unaware of any technical attributes that prevent wedge cases from being tested using the DOE test procedure, or that the DOE test procedure is not representative of the energy use of a given basic model of wedge case. 78 FR at 64307 (Oct. 28, 2013).

DOE did not receive any comments from interested parties regarding treatment of wedge cases during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

m. Misting or Humidification Systems

Manufacturers may offer for sale with a basic model optional misting or humidification systems, which dispense a water mist used to maintain the optimal quality of products. These are commonly used with cases containing, for example, fresh produce, meat, or seafood. In the October 2013 test procedure NOPR, DOE proposed that, if present, these systems should be inactive during testing under the DOE test procedure and proposed to add clarifying language as part of the regulatory text. 78 FR at 64307–64308 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of misting or humidification systems during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

n. Air Purifiers

Manufacturers may offer for sale purifying systems to remove contaminants from air recirculated within the interior of a refrigerated case. In the October 2013 test procedure NOPR, DOE proposed that air purifiers should be inactive during testing under the DOE test procedure and proposed to add clarifying language as part of the regulatory text. 78 FR at 64308 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of air purifiers during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

o. General Purpose Outlets

Some commercial refrigeration equipment may be offered for sale with integrated general purpose electrical outlets, which may be used to power additional equipment such as scales or slicers. In the October 2013 test procedure NOPR, DOE proposed that, during testing under the DOE test procedure, no external load should be connected to the general purpose outlets contained within a unit and proposed to add clarifying language as part of the regulatory text. 78 FR at 64308 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of general purpose outlets during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

p. Crankcase Heaters

Some models of self contained commercial refrigeration equipment feature electric resistance heaters designed to keep the compressor warm in order to maintain the refrigerant contained within at optimal conditions when the unit is operating at low ambient temperatures. In the October 2013 test procedure NOPR, DOE proposed that, if present, crankcase heaters should be operational during the test. Under this proposal, if a control system, such as a thermostat or electronic controller, is used to modulate the operation of the crankcase heater, it should be used as intended per the manufacturer's instructions. DOE proposed to add clarifying language regarding testing units with crankcase heaters. 78 FR at 64308 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal regarding treatment of crankcase heaters during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

q. Interior/Exterior Liners

Manufacturers may offer for sale a variety of different interior or exterior liner materials with a given CRE basic model. These liners, by virtue of differences in thickness, composition, and other physical attributes, could change the insulative properties of the case walls and thus alter the energy consumption of the case. The test procedure estimates the heat loss from the refrigerated space to the surroundings by measuring the amount of energy needed to maintain the refrigerated space at the given rating temperature. In the October 2013 test procedure NOPR, DOE presented its belief that the DOE test procedure adequately accounts for variability in the energy consumption of models with different liner types just as it accounts for the energy performance of models with varying levels of insulation. Therefore, DOE did not propose any additional measures to accommodate these equipment features. 78 FR at 64308 (Oct. 28, 2013).

DOE did not receive any comments from interested parties on its proposal

regarding treatment of interior/exterior liners during the DOE test procedure and, as such, is adopting the proposal presented in the October 2013 test procedure NOPR with no modifications.

r. Crankcase Pressure Regulators

During the 2013 Working Group meetings, stakeholders mentioned that they sometimes equip the compressors of self-contained commercial refrigeration units with devices called crankcase pressure regulators. The function of these devices is to maintain optimal gas pressure within the compressor crankcase in instances where the voltage input to the compressor may not be uniform. This often is the case, for example, in rural locations where the transmission system may experience interruptions or fluctuations resulting in line voltage drops. Working Group members agreed unanimously that manufacturers should offer an identical model without this feature for the purposes of testing. DOE plans to address this through guidance.

s. Other Comments Received From Interested Parties

In response to the October 2013 test procedure NOPR, DOE received several additional comments pertaining to its treatment of accessories generally. Zero Zone agreed with DOE's accommodations of some specific accessories and features proposed in the October 2013 test procedure NOPR. However, Zero Zone questioned why DOE did not make allowances for customers with high ambient humidities and allow the use of higher anti-sweat heat for those applications. Zero Zone recommended that, to be consistent, DOE should require testing with the options it plans to exclude in this rulemaking, and if the equipment can't pass the energy standard with these options installed, customers need to modify their stores to avoid the need for the equipment modifications. (Zero Zone, No. 18 at p. 3)

The government of the People's Republic of China (China) recommended that all non-core energy-consuming accessories, such as lighting associated with short-term opening and closing of the refrigerator door, networking and standby, or operation of the deodorizing system, should be left out and not included in the measurement of daily energy consumption. (China, No. 10 at p. 2) In addition, China recommended that, if a manufacturer included in their product literature information that the operation of some functions was auxiliary to the effective operation of the refrigeration equipment, their energy consumption would account for a small proportion of total energy consumption and could be excluded from the calculation of total or combined daily energy consumption. (China, No. 10 at p. 4)

In response to Zero Zone's comment regarding accounting for the use of anti-sweat heaters at high humidities in the DOE test procedure, DOE notes that its test procedure is meant to represent an average cycle of use. The ambient temperatures required in the DOE test procedure are 75 °F and 45 percent relative humidity. These ambient conditions apply to all equipment and are meant to be representative of the typical installation conditions for most commercial refrigeration equipment. DOE does not believe that the additional complexity and burden associated with testing at additional or different ambient temperature conditions for some equipment is justified to capture additional use of anti-sweat heaters. DOE notes that, as presented in section III.A.5.c, this final rule establishes provisions that anti-sweat door heaters that do not have automatic controls should be energized when testing in accordance with the DOE test procedure and that energy use due to anti-sweat door heaters that have automatic controls will be captured based on the control algorithm associated with the automatic control scheme.

In response to China's comment regarding the treatment of non-core or auxiliary accessories, DOE believes that, to a large extent, the provisions adopted in this section address the appropriate treatment of specific non-core and auxiliary accessories. DOE notes that, to ensure consistent and repeatable testing, it is beneficial to adopt specific test provisions for the treatment of specific accessories. The proposals adopted in this test procedure final rule address specific accessories agreed upon as a result of negotiations between DOE and interested parties. DOE does not believe adopting more-general provisions for the treatment of "non-core" accessories, as suggested by China, is necessary. In addition, DOE believes such ambiguous provisions may result in misinterpretation and lack of consistency in implementation of the test procedure. Therefore, DOE is not adopting provisions for testing of accessories other than those proposed in the October 2013 test procedure NOPR. 78 FR at 64306–08 (Oct. 28, 2013).

6. Rounding of Test Results and Certified Ratings

The current DOE test procedure, which incorporates by reference provisions from ARI 1200–2006 and AHRI 1200–2010, requires that the calculated daily energy consumption (CDEC), for remote condensing equipment, and the total daily energy consumption (TDEC), for self-contained refrigeration equipment, be expressed in terms of kilowatt-hours (kWh) per day and must be stated in increments of 0.01 kWh per day. This is consistent with the number of significant figures expressed in the energy conservation standards listed at 10 CFR 431.66.

DOE's requirements for calculating test results and certified ratings for covered commercial refrigeration equipment are found at 10 CFR 431.64 and 10 CFR 429.42, respectively. The DOE test procedure currently requires that results for CDEC or TDEC resulting from testing a single unit be rounded to 0.01 kWh per day. In the case where the reported value is derived from testing, at least two or more units should be tested pursuant to 429.42 and the appropriate sampling statistics must be applied in order to develop the represented value. DOE is adopting in this final rule provisions to clarify that the represented value should also be rounded to the nearest 0.01 kWh per day after application of the sampling statistics. For commercial refrigeration equipment rated using an AEDM, the certified rating must be derived pursuant to 429.70 and rounded to 0.01 kWh per day.

In the October 2013 test procedure NOPR, DOE proposed to clarify 10 CFR 431.64 by specifying that all calculations in the DOE test procedure must be carried out using raw, measured values, and the results from the testing of a single unit of a given basic model should be expressed in 0.01 kWh per day. DOE also proposed to update the language at 10 CFR 429.42 to reflect the same rounding requirements, namely that certified ratings be expressed in 0.01 kWh per day increments. 78 FR at 64308 (Oct. 28, 2013).

In response to this proposal, Traulsen suggested that, in lieu of leaving an ambiguous rounding factor that may result in inconsistencies between manufacturers or reporting entities, DOE require all calculations to be carried out to the third decimal point and rounding to the second decimal point for the purposes of certification and compliance with DOE's energy conservation standards. (Traulsen, No. 17 at p. 3) Southern Store Fixtures commented that the rounding of test results and the raw data, per ASHRAE Standard 72, is carried to one decimal point and should be consistent with this test procedure. (Southern Store Fixtures, Public Meeting Transcript, No. 7 at p. 165)

In response to Southern Store Fixtures' comment regarding values in ASHRAE 72–2005 that are carried to the first decimal point, DOE notes that pressure and temperature measurements are specified to the first decimal point and reporting these values to the third decimal point may be inappropriate. However, these values are not used directly in the calculation of TDEC or CDEC, and the number of significant digits past the decimal is not relevant. For these quantities, the number of significant digits to be carried through calculations is dictated by the number of significant digits in the value as a whole, and at least three significant digits are expected for all these quantities.

In this final rule, DOE is not modifying the proposal presented in the October 2013 test procedure NOPR, and is adopting in this test procedure final rule language that all calculations in the DOE test procedure must be carried out using raw, measured values and the results from the testing of a single unit of a given basic model should be expressed in 0.01 kWh per day.

7. Testing at the Lowest Application Product Temperature

In the 2012 test procedure final rule, DOE establishes provisions for testing equipment that is not capable of achieving the prescribed rating temperature for its respective equipment class: 38 °F (±2 °F) for commercial refrigerators, 0 °F (±2 °F) for commercial freezers, and −15 °F (±2 °F) for ice-cream freezers. 77 FR at 10320 (Feb. 21, 2012). This equipment includes, for example, floral cases and ice storage cases, which do not have operating temperatures that are low enough to meet their respective rating temperature requirements. The 2012 test procedure amendments specify that such equipment must be tested at its LAPT, instead of the specified rating temperature for its given equipment class. 77 FR at 10320 (Feb. 21, 2012). DOE regulations at 10 CFR 431.62 define LAPT as the integrated average temperature closest to the specified rating temperature for a given piece of equipment achievable and repeatable such that the IAT of a given unit is within ±2 °F of the average of all IAT values for that basic model. For cases with thermostats, this will be the lowest thermostat set point.

a. Definition of Lowest Application Product Temperature

In the October 2013 test procedure NOPR, DOE clarified the definition and intent of the LAPT for equipment that cannot maintain the prescribed rating temperature. 78 FR at 64308–09 (Oct. 28, 2013). That is, DOE specified the LAPT is the lowest temperature at which a given basic model is capable of operating, and equipment rated under the LAPT provisions must be tested in accordance with all the requirements of the DOE test procedure, except that the rating temperature for this equipment will be the LAPT and the IAT measured during the test will be within ±2 °F of the LAPT instead of within ±2 °F of the prescribed rating temperature for that equipment class. DOE acknowledged that the lowest operating temperature for a given unit may vary slightly for specific units tested under a given basic model due to manufacturing tolerances, refrigerant charge, or other minor differences among units of a given CRE basic model. However, the LAPT should be specified such that, if DOE were to select a representative unit of this model randomly to test for compliance purposes, DOE would be able to test the unit by setting the unit to operate as cold as possible and achieve an integrated average temperature that is ±2 °F of the LAPT. 78 FR 64308–09 (Oct. 28, 2013).

In response to DOE's proposed clarification of LAPT in the October 2013 NOPR, interested parties had several suggestions regarding the definition of LAPT. Traulsen recommended the following clarification to the LAPT definition: The term "LAPT" is attained by adjusting the unit thermostat to the lowest operating temperature where the "IAT" is maintained at a condition of ±2 °F over the duration of the test procedure. The LAPT value is equal to or greater than the rating temperature based on refrigeration system capacity or lowest possible thermostat set point. (Traulsen, No. 15 at p. 3) Hussmann recommended that DOE change the definition of LAPT for remote equipment without a thermostat from "adjusted dew point" to "dew point," since that is what is controlled in a test environment. Hussmann also stated that it believed the LAPT should not be below the manufacturer's lowest specified operating temperature and that testing of the LAPT as the "temperature achieved with the adjusted dew point temperature (as defined in AHRI Standard 1200 (I–P) 2010) set to 5 degrees colder than that required to maintain the manufacturers lowest specified operating temperature" will only result in an unsuccessful, unrepeatable, non-steady state test due to excessive ice build-up on the evaporator coil. (Hussmann, No. 11 at p. 3)

DOE appreciates the recommendations submitted by interested parties regarding the definition and specification of LAPT. Specifically, DOE believes that Traulsen's recommended language is generally incorporated into the existing definition and procedure proposed in the October 2013 test procedure NOPR. Further, DOE notes that the term "LAPT" should be defined so as to describe the characteristics and specification of the lowest IAT a CRE basic model is capable of achieving, rather than the procedure for determining LAPT, which is described in the relevant section of 10 CFR 431.64. DOE also notes that the LAPT for a given CRE basic model does not have to be "maintained" throughout the test procedure, but rather the IAT resulting from conducting the test procedure should be within ±2 °F of the specified LAPT.

In addition, in response to Hussmann's recommendation regarding the LAPT provisions for remote equipment that does not have a thermostat, DOE agrees with Hussmann that it may be more appropriate to specify the dew point, as opposed to the adjusted dew point for remote equipment. AHRI 1200–2010 defines the dew point as the refrigerant vapor saturation temperature at a specified pressure. This corresponds typically to the temperature in the evaporator. Conversely, the adjusted dew point is defined in AHRI 1200–2010 as a temperature lower than the actual dew point to account for suction line pressure losses and represents the saturated suction temperature at the compressor. This is more representative of the refrigerant temperature entering the compressor and is the value used to specify compressor performance for the purposes of determining the CDEC for remote cases in AHRI 1200–2010. AHRI 1200–2010 further specifies the adjusted dew point as 2 °F lower than the evaporator dew point for commercial refrigerators and 3 °F lower than the evaporator dew point for commercial freezers, when applying standardized assumptions regarding condensing rack performance (see Table 1 in section 5, "Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets," of AHRI 1200–2010). While the dew point and the adjusted dew point are dependent on one another, DOE acknowledges that the dew point controls the internal refrigerated temperature directly and is what is directly controlled in a test environment. DOE notes that specifying

the dew point, rather than the adjusted dew point, as 5 degrees below that required to maintain the manufacturer's lowest specified operating temperature will not change the resultant LAPT value for remote equipment, as the two values are dependent on one another. Specifically, the adjusted dew point is specified as 3 °F lower than the dew point for commercial freezers and ice-cream freezers and 2 °F lower than the dew point for commercial refrigerators.

In response to Hussmann's comment that specifying the adjusted dew point as 5 degrees colder than that required to maintain the manufacturer's lowest specified operating temperature will result in internal refrigerated temperatures that may be lower than the manufacturer's lowest specified operating temperature, which could lead to ice buildup on the evaporator coil, DOE acknowledges that this may be a concern but notes that this may be an issue for only a small number of basic models. If a model is not able to operate consistently at a temperature 5 degrees below the dew point required to maintain the manufacturer's lowest specified operating temperature, a manufacturer must request a test procedure waiver.

DOE notes that it adopted such language in the 2012 test procedure final rule to ensure that the achieved LAPT represented a conservative rating for remote equipment. DOE believed this was necessary because the internal refrigerated temperature for remote equipment is so variable and dependent on the remote condensing rack capacity and operation. 77 FR at 10305 (Feb. 21, 2012). DOE is reluctant to revise the LAPT for remote equipment without a thermostat as the dew point required to achieve the necessary integrated average temperature inside the case for that basic model. As recommended by Hussmann, this approach would allow manufacturers to specify virtually any temperature as the LAPT for a given CRE basic model, including a temperature not representative of the lowest temperature the CRE model can achieve. As such, DOE is adopting language that continues to establish the LAPT for remote equipment without a thermostat based on specifying the dew point as 5 degrees below the temperature required to maintain the lowest specified operating temperature of that equipment.

b. Incorporation by Reference of ASHRAE 72–2005

Although ASHRAE 72–2005 is currently evoked as the DOE method of test through DOE's incorporation by reference of ARI 1200–2006 and AHRI 1200–2010 as the test procedure for commercial refrigeration equipment, DOE has never specifically incorporated by reference ASHRAE 72–2005. Due to the explicit reference of ASHRAE 72–2005 in the proposed definition of LAPT in the October 2013 test procedure NOPR, DOE proposed to incorporate by reference ASHRAE 72–2005 at 10 CFR 431.63. 78 FR at 64309 (Oct. 28, 2013).

In response to DOE's proposal to incorporate by reference ASHRAE 72–2005, ASHRAE recommended that DOE update the reference of ANSI/ASHRAE 72–2005 to the 2013 edition of this standard. (ASHRAE, No. 8 at p. 1) DOE notes that, at this time, a new edition of ASHRAE 72 is not available. DOE is aware that ASHRAE 72 is intended to be published soon, but DOE is not electing to delay publication of this final rule to accommodate ASHRAE's publication timeline. When a new edition of ASHRAE 72 is available, DOE will review the revised test protocol and consider amending DOE's test procedure to reference the updated ASHRAE 72 version, as appropriate.

8. Clarifications in Response to Interpretations to AHRI 1200–2010

The 2012 test procedure final rule amends the DOE test procedure for commercial refrigeration equipment to reference AHRI 1200–2010 as the method of test to be used as of the compliance date of the amended standards established published in the March 2014 energy conservation standards final rule. 77 FR at 10295 10296 (Feb. 21, 2012); 79 FR 17726, 17734 (Mar. 28, 2014).

In the October 2013 test procedure NOPR, DOE discussed five interpretations to AHRI 1200–2010 that AHRI had recently published. AHRI issued interpretations 1 through 4 to AHRI 1200–2010 to clarify the method for calculation of TDA. Interpretation 5 to AHRI 1200–2010 clarifies the approach for testing commercial refrigeration equipment with two independent refrigeration sections. 78 FR at 64309–64310 (Oct. 28, 2013). In the October 2013 test procedure NOPR, DOE presented its belief that the TDA should be measured as the "projected visible area" and discussed how Interpretations 1, 3, and 4 were consistent with this method. Specifically, Interpretation 1 specifies that TDA should not include any transparent areas where the view is blocked by solid features, Interpretation 3 describes how to treat silk screens and other semi-transparent coverings on transparent doors or panels, and Interpretation 4 provides guidance to determine the area and length of commercial refrigeration equipment with curved fronts. DOE did not propose further clarification of the DOE test procedure beyond the definition of "transparent" proposed in section III.B.2.a of the October 2013 test procedure NOPR, believing that the existing test instructions contained in ARI 1200–2006, AHRI 1200–2010, and the DOE test procedure were sufficient to specify clearly how to calculate TDA for cases with solid features covering portions of projected area or for cases with non-rectangular geometries. 78 FR at 64310 (Oct. 28, 2013). However, DOE found Interpretation 2, which includes solid features in the calculation of TDA such as door frames and mullions, to be inconsistent with DOE's method of calculating TDA. DOE's proposed method, comments received by interested parties, and DOE's responses are laid out in more detail in section III.A.9.

DOE also reviewed Interpretation 5, which clarifies the method for evaluating commercial refrigeration equipment with more than one refrigerated section, and found that AHRI's Interpretation 5 is consistent with the DOE test procedure for these systems, as specified at 10 CFR 431.66(d)(2)(i), which explains how to test commercial refrigeration equipment with more than one refrigerated compartment or section. 78 FR at 64310 (Oct. 28, 2013).

In response to DOE's discussion of the AHRI interpretations in the October 2013 test procedure NOPR, China recommended adding clarifying language to specify how to calculate the TDA for curved front cases and suggested that the TDA for these cases be based on the effective projected area. (China, No. 10 at p. 3)

DOE acknowledges China's suggestion that the DOE test procedure provide more-explicit guidance for how to calculate TDA for cases with unique, non-rectangular geometries. DOE notes that AHRI Interpretation 4 lays out clearly the approach for doing so. DOE discussed this approach in the October 2013 test procedure NOPR and determined that it was consistent with the DOE test procedure and did not need clarification. 78 FR at 64310 (Oct. 28, 2013). However, based on China's request, DOE notes that some interested parties may find additional clarification useful. As such, DOE is adopting additional clarification in the DOE test procedure for cases with curved front geometries.

DOE notes that, on October 1, 2013, ANSI approved a revised edition of the AHRI 1200 test procedure, AHRI 1200–2013, which incorporates a new graphic

to Appendix D describing the measurement of TDA for cases with curved-fronts and adds language clarifying the calculation of the height dimension (D_h). Specifically, AHRI 1200–2013 specifies that the dimension L shall be taken as the arc length of the curves section of visible product area. AHRI 1200–2013 also adopted language to Appendix D that reads "when measuring D_h, only the visible dimension shall be considered. Opaque door frames, light shades, non-transparent silk screens, and the like that impede visibility shall be excluded from the measurement." AHRI 1200–2013 did not make any other changes to the methods, nomenclature, or layout of AHRI 1200, and is otherwise consistent with ARI 1200–2006 and AHRI 1200–2010, the test procedures currently incorporated by reference into the DOE test procedure.

In the 2012 test procedure final rule, DOE incorporated by reference AHRI 1200–2010 as the test procedure for commercial refrigeration equipment manufactured on or after the compliance date of the amended energy conservation standards adopted in the March 2014 energy conservation standards final rule.[13] 77 FR at 10295, 10308–09, 10318–21 (Feb. 21, 2012); 79 FR 17726, 17734 (Mar. 28, 2014). DOE also maintained the incorporation by reference of ARI 1200–2006 for equipment certified prior to March 28, 2017. 77 FR at 10318–10320 (Feb. 21, 2012). In the 2012 test procedure final rule, DOE discussed the changes made between ARI 1200–2006 and AHRI 1200–2010 as including both editorial and technical changes to (1) the equipment class nomenclature used within the test procedure; (2) the integrated average rating temperature for ice-cream freezers; and (3) the method of normalizing and reporting units for equipment energy consumption. 77 FR at 10296 (Feb. 21, 2012). AHRI 1200–2013 differs from AHRI 1200–2010 in adopting (1) a new definition of "transparent surface," which is a surface with a minimum of 65 percent light transmission or 65 percent clear surface; (2) a new statement in Appendix D specifying that when calculating D_h only the visible dimension shall be considered; and (3) an additional figure, Figure D18, providing clarification regarding the calculation of TDA for radius cases with transparent sides.

DOE finds the amendments adopted in AHRI 1200–2013 to be generally consistent with the DOE test procedure for commercial refrigeration equipment, except DOE finds the need for additional clarity surrounding the description of how TDA is to be calculated for radius cases the definition of "transparent surface." For radius cases, DOE maintains that TDA shall be calculated as the projection of visible product, as described in section III.A.9. To clarify the method for calculating TDA for equipment with curved-front geometries, DOE is adopting a new figure specifying the dimensions D_h, L, and area A_e are to be determined as planar projections of the area of visible product when viewed at an angle normal to the transparent area for radius cases. Regarding the definition of "transparent surface," as discussed in section III.A.2.b, DOE adopts a definition of "transparent" based on a light transmittance of 45 percent when measured in accordance with ASTM Standard E 1084–86 (Reapproved 2009).

9. Clarification of Methodology for Measuring Total Display Area

DOE uses TDA to determine the applicable performance standard for remote condensing commercial refrigeration equipment with transparent doors or no doors. Appendix D of ARI 1200–2006 and AHRI 1200–2010, as incorporated by reference by DOE at 10 CFR 431.63, provides a definition and instructions on determining TDA. AHRI 1200–2013 provides the same definition and instructions, and specifies that when calculating D_h, only the visible dimension shall be considered, an additional figure, Figure D18, provides clarification regarding the calculation of TDA for radius cases with transparent sides. Appendix D of ARI 1200–2006, AHRI 1200–2010, and AHRI 1200–2013 defines TDA as follows:

"Total Display Area (TDA) is the sum of the projected area(s) for visible product."

Moreover, Appendix D provides a general equation for calculating the "projected area(s)," in the form of:

$TDA = D_h * L + A_e$,

Where:

A_e = Projected area from visible product through end walls

D_h = Dimension of projected visible product

L = Length of Commercial Refrigerated Display Merchandiser

Figures D1 through D16 of Appendix D of ARI 1200–2006, AHRI 1200–2010, and AHRI 1200–2013 provide instructions on the measurement of D_h, L, and A_e for various geometries of commercial refrigerated display merchandisers. These figures show that TDA includes only those areas through which displayed product is visible for the A_e and D_h dimension, irrespective of the presence of other transparent areas through which product cannot be viewed. As Interpretations 1, 3, and 4 of AHRI 1200–2010 and the amendments adopted in AHRI 1200–2013 make clear, the converse is also true—areas of the product zone that cannot be viewed as part of a direct projection through a transparent area are not to be included in any measurement of D_h. The term "direct projection" refers to the view at an angle perpendicular to the plane of product presentation (facing area). ARI 1200–2006, AHRI 1200–2010, and AHRI 1200–2013 all define the third variable, "L", as the "length of commercial refrigerated display merchandiser." However, Appendix D contains no figures or illustrations instructing a user how to perform this measurement.

In the October 2013 test procedure NOPR, DOE discussed the calculation of TDA for various CRE models and, at the public meeting presented figures, to illustrate the concept that the measurement of TDA in practice should be consistent with its definition as the "dimension of projected visible product." (DOE, No. 3 at pp. 68–71) DOE clarified that this included the dimension L, which corresponds to the total length of the transparent area of the merchandiser through which product can be seen; areas of opaque material that overhang the product zone and well as areas of transparent material that do not project upon a zone occupied by product, should not be included in this length. To clarify the calculation of TDA, DOE proposed to add clarifying text and figures to the test procedure explaining that the measurement of TDA should be representative of the "dimension of projected visible product" and that no opaque materials or areas of transparent material through which product cannot be viewed should be included in the calculation of TDA. 78 FR at 64310–64312 (Oct. 28, 2013).

In response to DOE's proposal to clarify the method of calculating TDA, DOE received several comments from interested parties objecting to DOE's interpretation and offering suggestions for other methods of calculating the dimension L when determining TDA of a CRE basic model with transparent doors or no doors. AHRI, Hill Phoenix, Hussmann, and Zero Zone disagreed

[13] In the 2012 test procedure final rule, DOE adopted a specific date (January 1, 2016), which was the anticipated compliance date for any standards amended as a result of the ongoing CRE energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003). However, DOE discussed in the preamble to the 2012 test procedure final rule that the intent was to require compliance with the test procedure amendments adopted in that final rule consistent with the compliance of any new or amended standards. 77 FR 10292, 10295, 10308–9, 10318–21 (Feb. 21, 2012).

with DOE's definition of the length of a commercial refrigerated display merchandiser and stated that industry has always treated the length "L" as the "length of the commercial refrigerated display merchandiser" from inside wall to inside wall, disregarding the presence of non-transparent mullions and door frames. AHRI, Hill Phoenix, Hussmann, and Zero Zone further believed, and provided quantitative justification to support, that DOE must have used case length in the engineering analysis for the 2009 and the current rulemaking. (Docket No. EERE–2012–BT–STD–0003) The commenters stated it is impossible to have a typical 30-inch by 67-inch door have 13 square feet of TDA without including the mullions and door frames and provided analysis to support this viewpoint. The commenters added that using TDA as DOE described in the October 2013 test procedure NOPR instead of case length would reduce the standard level by 10 to 12.5 percent. (AHRI, No. 15 at pp. 1–3; Hill Phoenix, No. 13 at pp. 2–6; Hussmann, No. 11 at pp. 3–4; Zero Zone, No. 18 at pp. 3–4) Hussmann expressed concern that changing the method for calculating TDA without changing the standards would unfairly penalize manufacturers. (Hussmann, Public Meeting Transcript, No. 7 at p. 190)

Arneg and Zero Zone commented that the TDA is dependent on the distance the observer is located from the door and their orientation of viewing. (Arneg, Public Meeting Transcript, No. 7 at p. 196; Zero Zone, Public Meeting Transcript, No. 7 at pp. 196–198)

To be consistent with current industry practice and DOE's energy conservation standard rulemaking analysis (Docket No. EERE–2010–BT–STD–0003), AHRI, Hill Phoenix, and Hussmann suggested that DOE use the interior refrigerated length, calculated from inside wall to inside wall, except for when a case has greater than 5 inches of non-transparent area. For CRE models with more than 5 inches of non-transparent length in the dimension L, the commenters recommended that DOE use total length of transparent area plus 5 inches. (AHRI, No. 15 at pp. 1–3; Hill Phoenix, No. 13 at pp. 2–6; Hussmann, No. 11 at p. 4)

Zero Zone recommended that DOE adjust the energy conservation standard to account for the reduction in TDA associated with not including the door frames and mullions in the calculation of TDA. If DOE elects not to adjust the energy conservation standard commensurate with the change in calculation of TDA, Zero Zone recommended that DOE not alter the calculation of TDA from that assumed in the engineering analysis for the ongoing energy conservation standard rulemaking (Docket No. EERE–2010–BT–STD–0003) and noted that the market place will sort out the value and utility of equipment that has more or less visible product. (Zero Zone, No. 18 at p. 4) Zero Zone suggested that DOE incorporate a TDA-dependent component in the formula for energy, and another component considering non-TDA space or volume, noting that this is a unique design, although something similar has been done for ice cases. (Zero Zone, Public Meeting Transcript, No. 7 at pp. 206–207) Traulsen suggested using volume to calculate energy consumption for glass door remotes, effectively bypassing the TDA discussion, or suggested leaving TDA as a square-footage calculated wall to-wall, top to bottom while ignoring the depth dimension. (Traulsen, Public Meeting Transcript, No. 7 at pp. 209 211)

Southern Store Fixtures expressed concern that setting the precedent of eliminating mullions could result in the elimination from the calculation of TDA of other components in the refrigerated space that occupy space not containing merchandise. Southern Store Fixtures asserted that this could eventually cause the calculation to become complicated and burdensome for manufacturers. (Southern Store Fixtures, Public Meeting Transcript, No. 7 at pp. 207–208)

Hussmann, True, and Zero Zone agreed that, for the majority of cases observed in the field, calculating L using the length of the interior refrigerated volume or the continuous length of the transparent doors (including mullions and doorframes) would be the same. (Hussmann, Public Meeting Transcript, No. 7 at pp. 217–218; True, Public Meeting Transcript, No. 7 at p. 218; Zero Zone, Public Meeting Transcript, No. 7 at pp. 219–220)

In response to the suggestions offered by interested parties, DOE finds that calculating TDA to include portions of non-transparent area is inconsistent with the stated definition of TDA. However, DOE acknowledges that defining TDA as strictly the total length of transparent area may be inconsistent with the method used by industry to calculate TDA today. As a compromise, DOE is adopting in this final rule, a method for calculating the TDA of CRE basic models that is representative of the dimension through which product can be viewed, but which accommodates small non-transparent areas that are part of the doors themselves and are typically included in the calculation of TDA by manufacturers today. With regards to the calculation of TDA for the vertical closed transparent case modeled in DOE's engineering analysis supporting the March 2014 energy conservation standards final rule, DOE notes that the case modeled represents a typical multi-deck refrigerated merchandiser with five doors of 13 square feet each, for a TDA of 65 square feet (see appendix 5A of the technical support document for March 2014 energy conservation standards rulemaking final rule, Docket No. EERE 2010–BT–STD–0003). DOE based its calculation of representative door TDA upon the continuous length of transparent area of the CRE model, which included mullions and door frames, but excluded any additional case wall present on the front face of the unit. In other words, DOE included the entire length of the transparent doors, including minor non-transparent areas, in its calculation of case TDA. DOE notes that, for the case modeled, the interior length of the refrigerated volume would be the same as the continuous length of transparent area when measured from door edge to door edge. DOE emphasizes that the model is meant to be representative of the energy use of a given type of commercial refrigeration equipment, and not to represent all the different design options available for any given model within an equipment category.

DOE agrees with interested parties that if the dimension L were determined strictly as the length of transparent area, not including any non-transparent mullions or door frames, the difference may be on the order of 10 percent. However, to respond to the concerns of interested parties, DOE is not adopting such a strict definition of L, but rather a "continuous" length of transparent area to be consistent with the continuous dimension of D_h. DOE believes that, to be consistent with the definition and intent of TDA, the dimension L should represent the continuous length of transparent area, as proposed in the October 2013 test procedure NOPR. 78 FR at 64321 (Oct. 28, 2013). However, DOE acknowledges that some unique case designs may feature large sections of case wall or other non-transparent area between sections of transparent area and agrees with interested parties that some threshold is necessary to ensure only materials with a significant majority of transparent area are included in the dimension L (*e.g.*, transparent doors with thin door mullions or other non-transparent hardware). DOE has reviewed the suggestion, submitted by interested parties that 5-inches or less of

non-transparent length be allowed in the measurement of L. DOE finds that a threshold of 5-inches or less is not sufficient to accommodate the non-transparent lengths for a large number of transparent-door CRE models with more than 3 doors. In addition, DOE notes that a fixed threshold of 5-inches for cases, regardless of the size of the case and the length of the dimension "L" does not treat all cases equivalently. However, DOE acknowledges that the concept of a threshold for non-transparent area, as suggested by interested parties, prevents cases with significant portions of non-transparent area between transparent doors or cases with transparent doors significantly inset from the case end walls from calculating an unrepresentatively high TDA, as would be the case if only interior refrigerated case length was used. As such, DOE believes a more consistent approach would be to apply a threshold of non-transparent area that may be included in the dimension "L" based on a percentage of the interior refrigerated case length that is not transparent. DOE is adopting in this final rule a threshold of 10 percent of non-transparent area that may be included in the dimension L. DOE believes this will more equitably treat the variety of case designs available on the market. DOE also notes that the 10 percent threshold is less stringent than the 5-inch threshold recommended by manufacturers. That is, a threshold of 10 percent accommodates greater amounts of non-transparent area in the dimension "L" for a majority of CRE models. In addition, a threshold of 10 percent is consistent with the modeling performed in the CRE energy conservation standard rulemaking (Docket No. EERE–2010–BT–STD–0003).

For those cases with greater than 10 percent of non-transparent area in the interior refrigerated length of the CRE model, DOE agrees with the general approach recommended by interested parties that the dimension L should be determined as the total length, along the axis of the merchandiser, of portions through which product can be viewed from an angle normal to the transparent area (*i.e.,* the projected linear dimension(s) of visible product) plus 10 percent, to provide equitable treatment of cases with different door configurations.

Therefore, in this final rule, DOE adopts instructions for calculating TDA that define L as the interior length of the CRE model, provided no more than 10 percent of that length consists of non-transparent material. For those cases with greater than 10 percent of non-transparent area, L shall be determined as the projected linear dimension(s) of visible product plus 10 percent of non-transparent area.

DOE believes this instruction is consistent with and clarifies current industry practice and the existing provisions of the DOE test procedure and, as such, believes that this amendment should not change the measured energy consumption of covered equipment. Therefore, DOE is adopting these amendments in both Appendix A, which is the test procedure required for equipment testing to demonstrate compliance with current energy conservation standards, and Appendix B, which will be required for testing on March 28, 2017, consistent with the compliance date of the amended energy conservation standards established in the March 2014 energy conservation standards final rule. 79 FR 17726, 17727 (Mar. 28, 2014).

10. Compliance Date of Test Procedure Amendments

In this final rule, DOE also reorganizes the test procedure requirements at 10 CFR 431.64 so that they are easier to understand, and updates the compliance date to be consistent with the compliance date of the amended standards established in the March 2014 energy conservation standards final rule. 79 FR 17726, 17727 (Mar. 28, 2014).

EPCA prescribes that if any rulemaking amends a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered equipment as determined under the existing test procedure. (42 U.S.C. 6314(a)(6)) Further, if DOE determines that the amended test procedure would alter the measured efficiency of covered equipment, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6314(a)(6))

In the 2012 test procedure final rule, DOE stated that some test procedure amendments will change the measured energy consumption of some covered equipment. 77 FR at 10295 and 10309 (Feb. 21, 2012). Specifically, DOE determined the provisions to accommodate testing of night curtains and lighting occupancy sensors and controls altered the measured energy consumption of covered equipment. 77 FR at 10309 (Feb. 21, 2012). As such, DOE established in the 2012 test procedure final rule that use of the amended test procedure for compliance with DOE energy conservation standards or representations with respect to energy consumption of commercial refrigeration equipment would be required on the compliance date of the revised energy conservation standards established in the March 2014 energy conservation standards final rule. 77 FR at 10309 (Feb. 21, 2012); 79 FR 17726, 17727 (Mar. 28, 2014).

To improve clarity, in the October 2013 test procedure NOPR, DOE proposed to reorganize the language at 10 CFR 431.64 into Appendices A and B. In the October 2013 test procedure NOPR, Appendix A contained the test procedure for commercial refrigeration equipment established in the 2006 test procedure final rule and Appendix B included the amended test procedure established in the 2012 test procedure final rule that will be required to be used on March 28, 2014, consistent with the compliance date of the amended standards established in the March 2014 energy conservation standards final rule. 78 FR at 64318–64325 (Oct. 28, 2013); 79 FR 17726, 17727 (Mar. 28, 2014).

In response to DOE's proposal, Hussmann stated that is does not understand why DOE cannot allow energy-saving features adopted in the 2012 test procedure final rule to demonstrate compliance with current energy conservation standards. (Hussmann, No. 11 at p. 3) Hussmann further stated that it believes that the provision allowing manufacturers to rate equipment conservatively that were tested at a temperature lower than the required 38 ± 2 °F provided the basic model still meets the applicable energy conservation standard should be included in Appendix A (effective 30 days after publication of a final rule in the **Federal Register**) as well as Appendix B. Hussmann added that this will reduce testing burden for manufacturers without sacrificing efficiency. (Hussmann, No. 11 at p. 3) Zero Zone commented that it agreed with DOE's proposed approach to test remote cases under the LAPT and suggested that the test method should be included as part of Appendix A and immediately become part of DOE's test procedure. (Zero Zone, No. 18 at p. 3)

With regard to permitting early use of the test procedure amendments established in the 2012 test procedure final rule, DOE acknowledges Hussmann's request and notes that DOE has published guidance establishing that, while manufacturers need not comply with a new or amended test procedure prior to the compliance date established for that test procedure, manufacturers may voluntarily use amended test procedures to rate and certify their products prior to the compliance date if they also comply

with energy conservation standards based on that test procedure. See *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/tp_faq_2012-06-29.pdf.* DOE cannot permit amended test procedure provisions that affect the measured energy consumption to be used to demonstrate compliance with energy conservation standards that were not set based on that test procedure. Specifically, the provisions adopted in Appendix B in this final rule may be used prior to the compliance date established in this final rule as long as the equipment also demonstrates compliance with the amended standards established in the March 2014 energy conservation standards final rule, which used that test procedure as a basis. 79 FR 17726, 17734 (Mar. 28, 2014). Manufacturers may not use the test procedure established in Appendix B to demonstrate compliance with existing energy conservation standards.

In response to Hussmann's request to include allowances for conservatively rating commercial refrigerators at temperatures lower than the specified rating temperature of 38 ± 2 °F in Appendix A as well as Appendix B, DOE acknowledges that, in addition to testing and certification to comply with DOE's energy conservation standards, commercial refrigeration equipment that is marketed to hold perishable food items must also be classified and certified by NSF/ANSI–7, "Commercial Refrigerators and Freezers" (hereafter referred to as NSF–7), a food safety standard issued by NSF.[14] NSF–7 establishes two classes for commercial display cases: Type I, which is tested at ASHRAE Standard 72 standard ambient conditions (75 °F dry bulb and 64 °F wet bulb temperature), and Type II, which is tested at higher ambient conditions (80 °F dry bulb and 68 °F wet bulb temperature). These two test conditions are also reported in terms of dry bulb temperature and percentage relative humidity. Type I corresponds to 75 °F and 55 percent relative humidity, and Type II corresponds to 80 °F and 60 percent relative humidity. NSF–7 also requires Type I and Type II equipment to be tested such that the average temperature of each test package containing an individual temperature sensor does not exceed 41 °F and no single temperature sensor exceeds a reading of 43 °F at any time during the test. NSF–7 does not specify a required average temperature for all test sensors or the measurement of energy consumption during the test. On the other hand, DOE does require an integrated average test temperature of 38 °F ± 2 °F. However, manufacturers have reported that they test cases at lower IATs than that specified by DOE to ensure the NSF–7 requirements are met. In the 2012 test procedure final rule, DOE establishes provisions that allow manufacturers to optionally test equipment at internal or ambient conditions more stringent than the prescribed DOE rating temperatures and conditions for that equipment class, to reduce the repetitive test burden of testing at both DOE and NSF–7 conditions. 77 FR at 10305–07 (Feb. 21, 2012).

DOE believes that accommodating Hussmann's request and including the provisions regarding certification of equipment at conservative IATs in both Appendix A and Appendix B won't affect the measured energy consumption of covered equipment or the stringency of the applicable energy conservation standard, as the provision is voluntary and thus is not required for equipment testing. In addition, DOE believes that allowing manufacturers to implement this conservative rating approach as of 30 days after publication of a final rule in the **Federal Register** will significantly reduce the burden associated with testing equipment that must be certified to both DOE's energy conservation standards and NSF's food safety standard. Therefore, DOE is adopting optional provisions to allow manufacturers to conservatively rate equipment at internal or ambient temperatures more stringent than the rating temperature or ambient conditions prescribed for their equipment class, provided the basic model still meets the applicable energy conservation standard, in both Appendix A and Appendix B. DOE notes that all other test procedure requirements must be satisfied to ensure a valid test; only the IAT and rating conditions may be adjusted.

In response to Zero Zone's recommendation that DOE include the provisions for testing equipment that cannot be tested at the specified rating temperature at the LAPT in Appendix A in addition to Appendix B, DOE is incorporating the LAPT provisions into both Appendix A and Appendix B as part of this final rule.

B. Other Notice of Proposed Rulemaking Comments and DOE Responses

In response to the October 2013 test procedure NOPR, DOE received comments from interested parties regarding several issues that pertain to the CRE test procedure, but not to specific provisions or amendments. Specifically, DOE received comments on the ambient temperatures used for testing commercial refrigeration equipment at standard rating conditions and the burden of testing.

1. Ambient Test Temperatures

DOE's test procedure for commercial refrigeration equipment establishes standard rating conditions for testing covered equipment of 75 °F and 55 percent relative humidity. Commercial refrigeration equipment that is marketed to hold perishable food items is classified and certified by NSF/ANSI–7, "Commercial Refrigerators and Freezers" (hereafter referred to as NSF–7), a food safety standard issued by NSF. NSF–7 establishes two classes for commercial display cases: Type I, which is tested at ASHRAE Standard 72 standard ambient conditions (75 °F dry bulb and 64 °F wet bulb temperature), and Type II, which is tested at higher ambient conditions (80 °F dry bulb and 68 °F wet bulb temperature). These two test conditions are also reported in terms of dry bulb temperature and percentage relative humidity. Type I corresponds to 75 °F and 55 percent relative humidity, and Type II corresponds to 80 °F and 60 percent relative humidity. NSF–7 also requires Type I and Type II equipment to be tested such that the average temperature of each test package containing an individual temperature sensor does not exceed 41 °F and no single temperature sensor exceeds a reading of 43 °F at any time during the test. NSF–7 does not specify a required average temperature for all test sensors or the measurement of energy consumption during the test. On the other hand, DOE does require an integrated average test temperature of 38 °F ± 2 °F. However, manufacturers have reported that they test cases at lower IATs than that specified by DOE to ensure the NSF–7 requirements are met.

Continental commented that commercial refrigeration equipment is designed primarily to keep food safe in harsh conditions and added that most commercial kitchens have multiple pieces of heat-generating cooking equipment near the refrigeration equipment and ambient temperatures much higher than 75 °F. Continental suggested that DOE utilize ambient test temperatures and allowable energy consumption levels cognizant of public health and safety. (Continental, No. 14 at p. 2)

In response to the comment from Continental, DOE believes that the existing test conditions specified within the ASHRAE 72 test procedure and

[14] NSF International. "NSF/ASNI 7– 2009: Commercial Refrigerators and Freezers." Ann Arbor, MI. *http://www.nsf.org/business/food equipment/standards.asp.*

accepted by industry are generally representative of field conditions. With respect to equipment designed to operate in harsher ambient conditions, DOE previously considered NSF Type II equipment in the 2012 test procedure final rule and found that the compressor systems can effectively operate at test temperatures. In the 2012 test procedure final rule, DOE agreed with interested parties that testing cases at an ambient temperature of 80 °F, rather than the currently specified 75 °F, will not have a significant impact on energy consumption for cases with doors and recognized that the impact on open cases may be greater than on closed cases, but did not believe that equipment will have operation or performance issues if tested at a the temperatures prescribed by the DOE test procedure. 77 FR at 10305–10307 (Feb. 21, 2012). DOE maintains that the energy consumption of a case should scale with ambient temperature and does not believe these issues will prevent units from being tested using the DOE-prescribed test temperatures or complying with any existing or amended DOE energy conservation standards.

2. Burden of Testing

Felix Storch, Inc. (FSI) expressed concern that there would be an undue burden on small business to conduct the proposed test procedures. FSI's opinion was that DOE has not calculated the full extent to which the proposed test procedures revisions will affect small manufacturers. FSI further commented that small businesses have limited R&D budgets and expertise to understand and carry out the proposed test procedures effectively. (FSI, No. 12 at p. 1)

FSI recommended, to limit burden on small business, that: (1) Small businesses be allowed to use a single test for each basic model; (2) DOE provide free consulting help to small businesses to interpret test procedures and be bound in enforcement cases by the interpretations it provides; (3) DOE, upon issuance of notices or rulemaking documents, be required to notify affected small businesses of new or revised regulations, and no enforcement be permitted against small business absent such notification; and (4) CCMS submission be optional, not required, for small businesses as this represents a large burden with little benefit to the consumer community. (FSI, No. 12 at p. 3) Finally, FSI stated that small businesses, such as FSI, serve small niche markets and increase customer choice by providing customizable solutions. (FSI, No. 12 at p. 3)

DOE understands that amending test procedures or including additional provisions in those test procedures could increase the burden on manufacturers to quantify the performance of their equipment. EPCA requires that the test procedures promulgated by DOE be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs of the covered equipment during a representative average use cycle. EPCA also requires that the test procedure not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

DOE has analyzed the expected incremental cost of the test procedure amendments adopted in this final rule and its impact on manufacturers. All commercial refrigeration equipment covered by this rule is currently required to be tested using the DOE test procedure to show compliance with applicable energy conservation standards. The DOE test procedure, as amended by the 2012 test procedure final rule, consists of one 24-hour test at standard rating conditions to determine daily energy consumption.

In addition, the 2012 test procedure final rule amends the test procedure for commercial refrigeration equipment to update the referenced industry test procedures to their most current versions (AHRI 1200–2010 and AHAM HRF–1–2008); incorporates provisions for testing certain energy efficiency features, including night curtains and lighting occupancy sensor and scheduled controls; and provides a test procedure for specialty equipment that cannot be tested at the prescribed rating temperature. As part of that rulemaking, DOE considered the burden associated with the test procedure amendments and certified that the rule would not have a "significant economic impact on a substantial number of small entities," and the preparation of a regulatory flexibility analysis was not warranted. 77 FR at 10314–10316 (Feb. 21, 2012).

The test procedure amendments adopted in this final rule only reorganize and clarify the existing requirements in the DOE test procedure, both those established in the 2006 test procedure final rule and those established in the 2012 test procedure final rule; they do not alter or affect any of the test procedure requirements or technical provisions in any way. DOE does not believe that the proposed test procedure amendments would affect the way in which any covered commercial refrigeration equipment is tested, nor would they impact the burden of conducting such a test.

In this test procedure final rule, DOE is also allowing manufacturers to test at the internal temperatures and/or ambient conditions required for NSF–7 testing within 30 days of publication of this final rule in the **Federal Register**. This will dramatically reduce the burden for manufacturers that produce equipment for food storage, as under the amended test procedure these two 24-hour tests can be combined. The NSF–7 test is similar in length and burden to the DOE test, but is performed at slightly different internal and external temperatures. Certification of equipment tested at NSF–7 test temperatures for the purposes of compliance with DOE energy conservation standards will only be possible for equipment that is able to meet the DOE energy conservation standard at the more stringent NSF–7 test conditions. However, DOE believes this provision can still potentially decrease the burden of test for some manufacturers.

The amendments to the test procedure for commercial refrigeration equipment were chosen to help minimize the impact of additional testing while clarifying and reorganizing the DOE test procedure to provide more accurate and repeatable test methods. Because none of these amendments significantly increase the burden of a test, DOE believes that the test procedure finalized here will not be unduly burdensome to conduct.

In response to FSI's comments regarding this impact of DOE's test procedure for commercial refrigeration equipment on small businesses, DOE notes that the bulk of FSI's recommendations address CCE provisions that were established in a previous rulemaking (76 FR at 12446–12449 (March 7, 2011)) and are not addressed in this final rule. DOE provided a robust analysis of the estimated burden of the test procedure clarifications and amendments adopted in this final rule and determined that these changes would not cause an undue burden on small manufacturers. This analysis is presented in section IV.B of this final rule.

With regard to burden on small manufacturers associated with previously promulgated rulemakings, DOE is only analyzing the incremental burden associated with the amendments and provisions adopted as a result of this final rule. However, DOE notes that previous rulemakings, such as those that accounted for the impact of CCE requirements on CRE manufacturers, including small businesses, have accounted for the incremental burden associated with these requirements and, in each case, found the burden to not

have a significant impact on a substantial number of small entities. Specifically, with regard to an allowance for small businesses to use a single test for each basic model, DOE established a sample size of not less than two in the CCE final rule for all manufacturers regardless of size to ensure a suitable representation of model variability. 76 FR at 12453 (March 7, 2011). Regarding the availability of free consulting help for small businesses to interpret test procedures, DOE has established a guidance process whereby interested parties may submit questions to DOE at any time regarding proper conduct of the DOE test procedure or compliance with relevant certification requirements. DOE also maintains a database of issues on which DOE has issued guidance for reference.[15] When DOE issues notices or rulemaking documents, these documents are immediately available on DOE's Web site for Appliance and Commercial Equipment Standards [16] and are publicly available via the **Federal Register**. DOE seeks to be as open as possible in conducting rulemakings and invites interested parties to participate openly. Regarding CCMS submission of certified ratings for small businesses, DOE has the same requirements for small businesses as for large entities and is under the same requirements to verify compliance with applicable energy conservation standards. Without certification reports, DOE has no record of compliance for applicable covered products. Further, DOE has attempted to design the CCMS templates to be as simple and straightforward as possible to minimize burden on manufacturers required to use these templates. Therefore, DOE continues to require certification of the TDEC or CDEC of covered basic models of commercial refrigeration equipment based on the testing of at least two unique units and the submittal of certification reports using DOE's CCMS templates.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute "significant regulatory actions" under section 3(f) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the OMB.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility act analysis (IRFA) whenever an agency is required to publish a general notice of proposed rulemaking. When an agency promulgates a final rule after being required to publish a general notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis. The requirement to prepare these analyses does not apply to any proposed or final rule if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the agency makes such a certification, the agency must publish the certification in the **Federal Register** along with the factual basis for such certification.

As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, so that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990 (Feb. 12, 2003) DOE has made its procedures and policies available on the Office of the General Counsel's Web site at *http://energy.gov/gc/office-general-counsel*

In the October 2013 test procedure NOPR, DOE reviewed the proposed rule to amend the test procedure for commercial refrigeration equipment, under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certified that the proposed rule, if adopted, would not result in a significant impact on a substantial number of small entities. 78 FR at 64313 (October 28, 2013). DOE received comments on its certification and the economic impacts of the test procedure, and has responded to these comments in section III.B.2. After consideration of these comments, DOE certifies that the test procedure amendments set forth in this final rule will not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below.

For the commercial refrigeration industry, the Small Business Association (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purpose of the statute. DOE used the SBA's size standards to determine whether any small entities would be required to comply with the rule. The size standards are codified at 13 CFR Part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.* Commercial refrigeration equipment manufacturing is classified under NAICS 333415, "Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing." Small entities within this industry description are those with 750 employees or fewer.

DOE conducted a market survey to determine whether any small business manufacturers of equipment would be covered by this rulemaking. During its market survey, DOE used all available public information to identify potential small manufacturers. DOE's research involved the review of industry trade association membership directories (including AHRI), equipment databases (e.g., Federal Trade Commission (FTC), the Thomas Register, California Energy Commission (CEC), and ENERGY STAR databases), individual company Web sites, and marketing research tools (e.g., Dunn and Bradstreet reports, Manta) to create a list of companies that manufacture or sell commercial refrigeration equipment covered by this rulemaking. DOE also referred to a list of small businesses that manufacture commercial refrigeration equipment, supplied by Traulsen in a written comment provided in response to the NOPR proposing amendments to the DOE test procedure for commercial refrigeration equipment published November 24, 2010 (Docket No. EERE-2010-BT-TP-0034, Traulsen, No. 9 at pp. 4–5). Using these sources, DOE identified 61 manufacturers of commercial refrigeration equipment.

DOE then reviewed this data to determine whether the entities met the SBA's definition of a small business manufacturer of commercial refrigeration equipment and screened out companies that do not offer equipment covered by this rulemaking, do not meet the definition of a "small business," or are foreign owned and operated. Based on this review, DOE has identified 26 companies that would be considered small manufacturers and will be directly regulated by this rule, which represents 43 percent of national CRE manufacturers. Although 43 percent would be considered a substantial number of small entities,

[15] U.S. Department of Energy Appliance & Commercial Equipment Standards Program Guidance and Frequently Asked Questions, available at: *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1.*

[16] *http://energy.gov/node/773531/about_appliance_and_equipment.html.*

further analysis of incremental costs associated with this rulemaking determined no significant impact on these manufacturers. Specifically, the changes to the test procedure adopted in this final rule consist only of clarifications regarding:

1. The applicability of the test procedure and related energy conservation standards to certain types of equipment;

2. the definitions of "hybrid commercial refrigeration equipment," "commercial refrigeration equipment with drawers," and "commercial refrigeration equipment with solid and/or transparent doors";

3. the relationship among the rating temperature, operating temperature, and integrated average temperature;

4. the proper configuration and use of energy management systems, lighting controls, and test packages in the DOE test procedure for commercial refrigeration equipment;

5. the treatment of various features, components, and accessories under the DOE test procedure;

6. the rounding requirements for test results and certified ratings;

7. the provision adopted in the 2012 test procedure final rule to allow testing at the lowest application product temperature for equipment that cannot operate at the prescribed rating temperature for its equipment class;

8. clarifications raised by Interpretations 1, 2, 3, 4, and 5 of AHRI 1200–2010;

9. the methodology used to determine total display area; and

10. the compliance date of certain amendments established in the 2012 test procedure final rule.

All commercial refrigeration equipment covered by this rule is currently required to be tested using the DOE test procedure to show compliance with established energy conservation standards. The DOE test procedure manufacturers must use to demonstrate compliance with existing standards is that established in the 2006 test procedure final rule, which references ARI 1200–2006 and AHAM HRF–1–2004. This test procedure consists of one 24-hour test at standard rating conditions to determine daily energy consumption.

The 2012 test procedure final rule amends the test procedure for commercial refrigeration equipment to update the referenced industry test procedures to their most current versions (AHRI 1200–2010 and AHAM HRF–1–2008); incorporates provisions for testing certain energy efficiency features, including night curtains and lighting occupancy sensor and scheduled controls; and provides a test procedure for specialty equipment that cannot be tested at the prescribed rating temperature. As part of that rulemaking, DOE considered the burden associated with the test procedure amendments and certified that the rule would not have a "significant economic impact on a substantial number of small entities," and the preparation of a regulatory flexibility analysis was not warranted. 77 FR at 10314–10316 (Feb. 21, 2012).

The test procedure amendments adopted in this final rule only reorganize and clarify the existing requirements in the DOE test procedure, both those established in the 2006 test procedure final rule and those established in the 2012 test procedure final rule; they do not alter or affect any of the test procedure requirements or provisions in any way. DOE does not believe that the proposed test procedure amendments would affect the way in which any covered commercial refrigeration equipment is tested, nor would they increase the burden of conducting such a test.

Rather, some of the provisions adopted in this final rule will reduce the burden associated with testing and certifying commercial refrigeration equipment. Specifically, this final rule allows manufacturers to reduce burden by testing and certifying equipment and internal and ambient test conditions that satisfy both the DOE test procedure and the NSF 7 test procedure effective 30 days after publication of this final rule in the **Federal Register**. This may significantly decrease the amount of testing manufacturers must do to demonstrate compliance with both programs.

DOE also notes that the amendments regarding the treatment of various features, components, and accessories under the DOE test procedure were the result of a series of negotiations that occurred between DOE, manufacturers, and energy efficiency advocates and, thus, represent a mutually agreed upon approach for each of these features. DOE believes adoption of these clarifications will streamline testing and make DOE's test procedure easier and more straightforward to implement.

The negotiations also resulted in a recently published final rule adopting amended regulations governing AEDMs, basic model definition, and compliance for commercial HVAC, refrigeration, and WH equipment. The AEDM provisions allow an alternative method for determining compliance in lieu of conducting actual physical testing. 78 FR 79579, 79590. Commercial refrigeration equipment previously were required to test two units of each basic model, so the addition of an AEDM option reduces the number of units for which manufacturers will need to conduct this test procedure. The 2013 AEDM final rule also clarified its basic model definitions, which give manufacturers the flexibility to group individual models based on certain characteristics into an individual basic model for the purposes of demonstrating compliance with DOE's energy conservation standards. DOE notes that the AEDM and basic model provisions adopted in the 2013 AEDM final rule will reduce the burden of demonstrating compliance with DOE's energy conservation standards in general, such that the burden estimates for testing discussed here represent a worse case. The specific reductions in burden accomplished in the 2013 AEDM final rule are discussed in more detail in that rule. 78 FR 79590–79591 (Dec. 31, 2013).

Based on this factual basis, DOE continues to certify that this rule will not have a "significant economic impact on a substantial number of small entities," and the preparation of a regulatory flexibility analysis is not warranted. DOE has transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of commercial refrigeration equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedure for commercial refrigeration equipment, including any amendments adopted for that test procedure. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including commercial refrigeration equipment. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB Control Number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE amends its test procedure for commercial refrigeration equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*). The rule is covered by Categorical Exclusion A5, for rulemakings that interpret or amend an existing rule without changing the environmental effect, as set forth in DOE's NEPA regulations in appendix A to subpart D, 10 CFR part 1021. This rule will not affect the quality or distribution of energy usage and therefore will not result in any environmental impacts. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR at 13735 (March 14, 2000). DOE has examined this final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA; Pub. 104–4 sec. 201 (codified at 2 U.S.C. 1531) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments in the aggregate or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate" and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *http://energy.gov/gc/office-general-counsel.*) DOE reviewed this final rule pursuant to UMRA and its policy and determined that the rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 15, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. The OMB's guidelines were published in 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published in 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA, Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and therefore it is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91), DOE must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977. When a proposed rule contains or involves use of commercial standards, the rulemaking must inform the public of the use and background of such standards. (15 U.S.C. 788 Section 32)

This final rule incorporates testing methods contained in ASTM Standard E 1084–86 (Reapproved 2009), "Standard Test Method for Solar Transmittance (Terrestrial) of Sheet Materials Using Sunlight," and ASHRAE 72–2005, "Method of Testing Commercial Refrigerators and Freezers." DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 323(b) of the Federal Energy Administration Act (*i.e.*, whether they were developed in a manner that fully provides for public participation, comment, and review).

As required by section 32(c) of the Federal Energy Administration Act of 1974 as amended, DOE has consulted with the Attorney General and the Chairman of the Federal Trade Commission about the impact on competition of using the methods contained in these standards before prescribing a final rule.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on April 10, 2014.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE amends parts 429 and 431 of chapter II of title 10, of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

§ 429.42 [Amended]

■ 2. Section 429.42 is amended by adding in paragraphs (b)(2)(i), (ii), and (iii), the words "increments of 0.01" before the phrase "kilowatt hours per day (kWh/day)."

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317

■ 4. Section 431.62 is amended by:
■ a. Removing the definition for "commercial hybrid refrigerator, freezer, and refrigerator freezer";
■ b. Adding in alphabetical order the definitions for "chef base or griddle stand," "closed solid," "closed transparent," "commercial freezer," "commercial hybrid," "commercial refrigerator," "commercial refrigerator freezer," "door," "operating temperature," "rating temperature," and "transparent"; and
■ c. Revising the definitions for "ice cream freezer" and "lowest application product temperature."

The additions and revision read as follows:

§ 431.62 Definitions concerning commercial refrigerators, freezers and refrigerator-freezers.

* * * * *

Chef base or griddle stand means commercial refrigeration equipment that is designed and marketed for the express purpose of having a griddle or other cooking appliance placed on top of it that is capable of reaching temperatures hot enough to cook food.

Closed solid means equipment with doors, and in which more than 75 percent of the outer surface area of all doors on a unit are not transparent.

Closed transparent means equipment with doors, and in which 25 percent or more of the outer surface area of all doors on the unit are transparent.

Commercial freezer means a unit of commercial refrigeration equipment in which all refrigerated compartments in the unit are capable of operating below 32 °F (±2 °F).

Commercial hybrid means a unit of commercial refrigeration equipment:

(1) That consists of two or more thermally separated refrigerated compartments that are in two or more different equipment families, and

(2) That is sold as a single unit.

Commercial refrigerator means a unit of commercial refrigeration equipment in which all refrigerated compartments in the unit are capable of operating at or above 32 °F (±2 °F).

Commercial refrigerator-freezer means a unit of commercial refrigeration equipment consisting of two or more refrigerated compartments where at least one refrigerated compartment is

capable of operating at or above 32 °F (±2 °F) and at least one refrigerated compartment is capable of operating below 32 °F (±2 °F).

* * * * *

Door means a movable panel that separates the interior volume of a unit of commercial refrigeration equipment from the ambient environment and is designed to facilitate access to the refrigerated space for the purpose of loading and unloading product. This includes hinged doors, sliding doors, and drawers. This does not include night curtains.

* * * * *

Ice-cream freezer means a commercial freezer that is designed to operate at or below −5 °F (±2 °F) (−21 °C ± 1.1 °C) and that the manufacturer designs, markets, or intends for the storing, displaying, or dispensing of ice cream.

* * * * *

Lowest application product temperature means the lowest integrated average temperature at which a given basic model is capable of consistently operating (*i.e.*, maintaining so as to comply with the steady-state stabilization requirements specified in ASHRAE 72–2005 (incorporated by reference, see § 431.63) for the purposes of testing under the DOE test procedure).

* * * * *

Operating temperature means the range of integrated average temperatures at which a self-contained commercial refrigeration unit or remote-condensing commercial refrigeration unit with a thermostat is capable of operating or, in the case of a remote-condensing commercial refrigeration unit without a thermostat, the range of integrated average temperatures at which the unit is marketed, designed, or intended to operate.

* * * * *

Rating temperature means the integrated average temperature a unit must maintain during testing (i.e., either as listed in the table at § 431.66(d)(1) or the lowest application product temperature).

* * * * *

Transparent means greater than or equal to 45 percent light transmittance, as determined in accordance with the ASTM Standard E 1084–86 (Reapproved 2009), (incorporated by reference, see § 431.63) at normal incidence and in the intended direction of viewing.

* * * * *

■ 5. Section 431.63 is amended by:

■ a. Removing "for § 431.64" in paragraphs (b)(1) and (b)(2) and adding in its place, "for § 431.64 and appendices A and B to subpart C to part 431";

■ b. Removing "and 431.66" in paragraphs (c)(1) and (2) and adding in its place, "431.66, and appendices A and B to subpart C of part 431"; and

■ c. Adding paragraphs (d) and (e) to read as follows:

§ 431.63 Materials incorporated by reference.

* * * * *

(d) *ASHRAE.* The American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1971 Tullie Circle NE., Atlanta, GA 30329, or *http://www.ashrae.org/.*

(1) ANSI/ASHRAE Standard 72–2005, (ASHRAE 72–2005), "Method of Testing Commercial Refrigerators and Freezers," Copyright 2005, IBR approved for § 431.62, and appendices A and B to subpart C of part 431.

(2) [Reserved]

(e) *ASTM.* ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428, (877) 909–2786, or go to *http://www.astm.org/.*

(1) ASTM E 1084 (Reapproved 2009), "Standard Test Method for Solar Transmittance (Terrestrial) of Sheet Materials Using Sunlight," approved April 1, 2009, IBR approved for § 431.62.

(2) [Reserved]

■ 6. Section 431.64 is amended by revising paragraph (b) to read as follows:

§ 431.64 Uniform test method for the measurement of energy consumption of commercial refrigerators, freezers, and refrigerator-freezers.

* * * * *

(b) *Testing and calculations.* Determine the daily energy consumption of each covered commercial refrigerator, freezer, or refrigerator-freezer by conducting the appropriate test procedure set forth below, in appendix A or B to this subpart. The daily energy consumption of commercial refrigeration equipment shall be calculated using raw measured values and the final test results shall be reported in increments of 0.01 kWh/day.

■ 7. Section 431.66 is amended by:

■ a. In the table in paragraph (d)(1) removing every instance of "≥32" and adding in its place "≥32 12", removing every instance of "<32" and adding in its place "<32 12", and removing "< 5**" and adding in its place "< 5 12**"

■ b. Adding paragraph (f) to read as follows:

§ 431.66 Energy conservation standards and their effective dates.

* * * * *

(f) *Exclusions.* The energy conservation standards in paragraphs (b) through (e) of this section do not apply to salad bars, buffet tables, and chef bases or griddle stands.

■ 8. Add appendices A and B to subpart C of part 431 to read as follows:

Appendix A to Subpart C of Part 431—Uniform Test Method for the Measurement of Energy Consumption of Commercial Refrigerators, Freezers, and Refrigerator-Freezers

Note: After October 20, 2014 but before March 28, 2017, any representations made with respect to the energy use or efficiency of commercial refrigeration equipment must be made in accordance with the results of testing pursuant to this appendix.

Manufacturers conducting tests of commercial refrigeration equipment after May 21, 2014 and prior to October 20, 2014, must conduct such test in accordance with either this appendix or § 431.64 as it appeared at 10 CFR part 430, subpart B, in the 10 CFR parts 200 to 499 edition revised as of January 1, 2014. Any representations made with respect to the energy use or efficiency of such commercial refrigeration equipment must be in accordance with whichever version is selected. Given that after October 20, 2014 representations with respect to the energy use or efficiency of commercial refrigeration equipment must be made in accordance with tests conducted pursuant to this appendix, manufacturers may wish to begin using this test procedure as soon as possible.

1. Test Procedure

1.1. Determination of Daily Energy Consumption. Determine the daily energy consumption of each covered commercial refrigerator, freezer, refrigerator-freezer or ice-cream freezer by conducting the test procedure set forth in the Air-Conditioning and Refrigeration Institute (ARI) Standard 1200–2006, "Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets," section 3, "Definitions," section 4, "Test Requirements," and section 7, "Symbols and Subscripts" (incorporated by reference, see § 431.63). For each commercial refrigerator, freezer, or refrigerator-freezer with a self-contained condensing unit, also use ARI Standard 1200–2006, section 6, "Rating Requirements for Self-contained Commercial Refrigerated Display Merchandisers and Storage Cabinets." For each commercial refrigerator, freezer, or refrigerator-freezer with a remote condensing unit, also use ARI Standard 1200–2006, section 5, "Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets."

1.2. Methodology for Determining Applicability of Transparent Door Equipment Families. To determine if a door for a given model of commercial refrigeration equipment is transparent: (1) Calculate the outer door surface area including frames and mullions; (2) calculate the transparent surface area within the outer door surface area excluding frames and mullions; (3) calculate the ratio

of (2) to (1) for each of the outer doors; and (4) the ratio for the transparent surface area of all outer doors must be greater than 0.25 to qualify as a transparent equipment family.

1.3. Additional Specifications for Testing of Components and Accessories. Subject to the provisions regarding specific components and accessories listed below, all standard components that would be used during normal operation of the basic model in the field shall be installed and in operation during testing as recommended by the manufacturer and representative of their typical operation in the field unless such installation and operation is inconsistent with any requirement of the test procedure. The specific components and accessories listed in the subsequent sections shall be operated as stated during the test.

1.3.1. Energy Management Systems. Applicable energy management systems may be activated during the test procedure provided they are permanently installed on the case, configured as sold and in such a manner so as to operate automatically without the intervention of the operator, and do not conflict with any of other requirements for a valid test as specified in this appendix.

1.3.2. Lighting. Energize all lighting, except customer display signs/lights as described in section 1.3.3 and UV lighting as described in section 1.3.6 of this appendix, to the maximum illumination level for the duration of testing. However, if a closed solid unit of commercial refrigeration equipment includes an automatic lighting control system that can turn off internal case lighting when the door is closed, and the manufacturer recommends the use of this system in writing in the product literature delivered with the unit, then the lighting control should be operated in the automatic setting, even if the model has a manual switch that disables the automatic lighting control.

1.3.3. Customer display signs/lights. Do not energize supplemental lighting that exists solely for the purposes of advertising or drawing attention to the case and is not integral to the operation of the case.

1.3.4. Condensate pan heaters and pumps. For self-contained equipment only, all electric resistance condensate heaters and condensate pumps must be installed and operational during the test. This includes the stabilization period (including pull-down), steady-state, and performance testing periods. Prior to the start of the stabilization period as defined by ASHRAE 72–2005 (incorporated by reference, see § 431.63), the condensate pan must be dry. Following the start of the stabilization period, allow any condensate moisture generated to accumulate in the pan. Do not manually add or remove water from the condensate pan at any time during the test.

1.3.5. Anti-sweat door heaters. Anti-sweat door heaters must be in operation during the entirety of the test procedure. Models with a user-selectable setting must have the heaters energized and set to the maximum usage position. Models featuring an automatic, non-user-adjustable controller that turns on or off based on environmental conditions must be operating in the automatic state. If a unit is not shipped with a controller from the point of manufacture and is intended to be used with an automatic, non-user-adjustable controller, test the unit with a manufacturer-recommended controller that turns on or off based on environmental conditions.

1.3.6. Ultraviolet lights. Do not energize ultraviolet lights during the test.

1.3.7. Illuminated temperature displays and alarms. All illuminated temperature displays and alarms shall be energized and operated during the test as they would be during normal field operation.

1.3.8. Condenser filters. Remove any nonpermanent filters that are provided to prevent particulates from blocking a model's condenser coil.

1.3.9. Refrigeration system security covers. Remove any devices used to secure the condensing unit against unwanted removal.

1.3.10. Night curtains and covers. Do not deploy night curtains or covers.

1.3.11. Grill options. Remove any optional, non-standard grills used to direct airflow.

1.3.12. Misting or humidification systems. Misting or humidification systems must be inactive during the test.

1.3.13. Air purifiers. Air purifiers must be inactive during the test.

1.3.14. General purpose outlets. During the test, do not connect any external load to any general purpose outlets contained within a unit.

1.3.15. Crankcase heaters. Crankcase heaters must be operational during the test. If a control system, such as a thermostat or electronic controller, is used to modulate the operation of the crankcase heater, it must be activated during the test.

1.3.16. Drawers. Drawers are to be treated as identical to doors when conducting the DOE test procedure. Commercial refrigeration equipment with drawers should be configured with the drawer pans that allow for the maximum packing of test simulators and filler packages without the filler packages and test simulators exceeding 90 percent of the refrigerated volume. Packing of test simulators and filler packages shall be in accordance with the requirements for commercial refrigerators without shelves, as specified in section 6.2.3 of ASHRAE 72–2005 (incorporated by reference, see § 431.63).

2. Test Conditions

2.1. Integrated Average Temperatures. Conduct the testing required in section 1 and 2 of this appendix A, and determine the daily energy consumption at the applicable integrated average temperature as found in the following table.

Category	Test procedure	Integrated average temperature
(i) Refrigerator with Solid Door(s)	ARI Standard 1200–2006 [1]	38 °F (±2 °F).
(ii) Refrigerator with Transparent Door(s)	ARI Standard 1200–2006 [1]	38 °F (±2 °F).
(iii) Freezer with Solid Door(s)	ARI Standard 1200–2006 [1]	0 °F (±2 °F).
(iv) Freezer with Transparent Door(s)	ARI Standard 1200–2006 [1]	0 °F (±2 °F).
(v) Refrigerator-Freezer with Solid Door(s)	ARI Standard 1200–2006 [1]	38 °F (±2 °F) for refrigerator compartment. 0 °F (±2 °F) for freezer compartment.
(vi) Commercial Refrigerator with a Self-Contained Condensing Unit Designed for Pull-Down Temperature Applications and Transparent Doors	ARI Standard 1200–2006 [1]	38 °F (±2 °F)
(vii) Ice-Cream Freezer	ARI Standard 1200–2006 [1]	15.0 °F (±2 °F)
(viii) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Self-Contained Condensing Unit and without Doors	ARI Standard 1200–2006 [1]	(A) 0 °F (±2 °F) for low temperature applications. (B) 38 °F (±2 °F) for medium temperature applications.
(ix) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Remote Condensing Unit	ARI Standard 1200–2006 [1]	(A) 0 °F (±2 °F) for low temperature applications. (B) 38 °F (±2 °F) for medium temperature applications.

[1] Incorporated by reference, see § 431.63.

2.2. Lowest Application Product Temperature. If a unit of commercial refrigeration equipment is not able to be operated at the integrated average temperature specified in the table in paragraph 2.1, test the unit at the lowest application product temperature (LAPT), as defined in § 431.62. For units equipped with a thermostat, LAPT is the lowest thermostat setting. For remote condensing equipment without a thermostat or other means of controlling temperature at the case, the lowest application product temperature is the temperature achieved with the dew point temperature (as defined in AHRI Standard 1200 (I–P)-2010 (incorporated by reference see § 431.63)) set to 5 degrees colder than that required to maintain the manufacturer's lowest specified operating temperature.

2.3. Testing at NSF Test Conditions. For commercial refrigeration equipment that is also tested in accordance with NSF test procedures (Type I and Type II), integrated average temperatures and ambient conditions used for NSF testing may be used in place of the DOE-prescribed integrated average temperatures and ambient conditions provided they result in a more stringent test. That is, the measured daily energy consumption of the same unit, when tested at the rating temperatures and/or ambient conditions specified in the DOE test procedure, must be lower than or equal to the measured daily energy consumption of the unit when tested with the rating temperatures or ambient conditions used for NSF testing. The integrated average temperature measured during the test may be lower than the range specified by the DOE applicable temperature specification provided in paragraph 2.1 of this appendix, but may not exceed the upper value of the specified range. Ambient temperatures and/or humidity values may be higher than those specified in the DOE test procedure.

3. Volume and Total Display Area

3.1. Determination of Volume. Determine the volume of a commercial refrigerator, freezer, refrigerator-freezer, or ice-cream freezer using the method set forth in the ANSI/AHAM HRF–1–2004, "Energy, Performance and Capacity of Household Refrigerators, Refrigerator-Freezers and Freezers" (incorporated by reference, see § 431.63), section 3.21, "Volume," sections 4.1 through 4.3, "Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Refrigerators and Household Wine Chillers," and sections 5.1 through 5.3, "Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Freezers."

3.2. Determination of Total Display Area. Determine the total display area of a commercial refrigerator, freezer, refrigerator-freezer, or ice-cream freezer using the method set forth in ARI Standard 1200–2006 (incorporated by reference, see § 431.63), but disregarding the specification that "transparent material (≥65% light transmittance) in Appendix D. Specifically, total display area shall be the sum of the projected area(s) of visible product, expressed in ft^2 (*i.e.*, portions through which product can be viewed from an angle normal, or perpendicular, to the transparent area). Determine L as the interior length of the CRE model, provided no more than 10 percent of that length consists of non-transparent material. For those cases with greater than 10 percent of non-transparent area, L shall be determined as the projected linear dimension(s) of visible product plus 10 percent of non-transparent area.

See Figures A3.1, A3.2, A3.3, A3.4, and A3.5 as examples of how to calculate the dimensions associated with calculation of total display area. In the diagrams, D_h and L represent the dimensions of the projected visible product.

BILLING CODE 6450–01–P

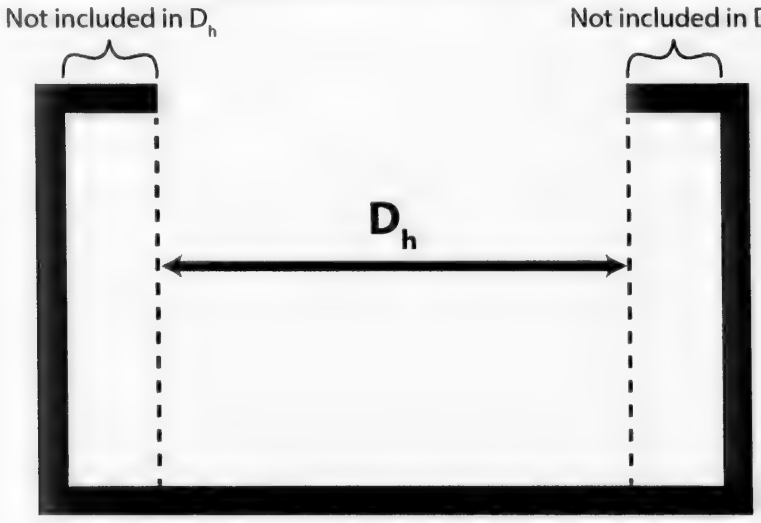


Figure A3.1 Horizontal open display case, where the distance "D_h" is the dimension of the projected visible product.

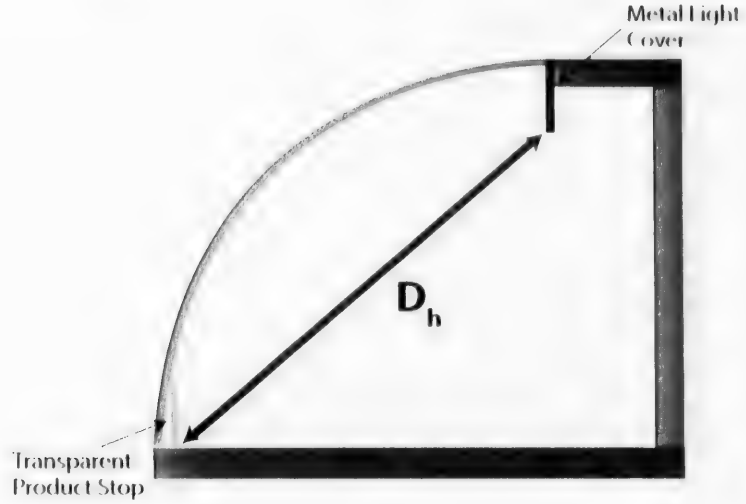


Figure A3.2 Service over counter display case, the distance "D_h" is the dimension of the projected visible product, that being the dimension transverse to the length of the case through which product can be viewed, excluding areas of the product zone that cannot be viewed as part of a direct projection through the glass front.

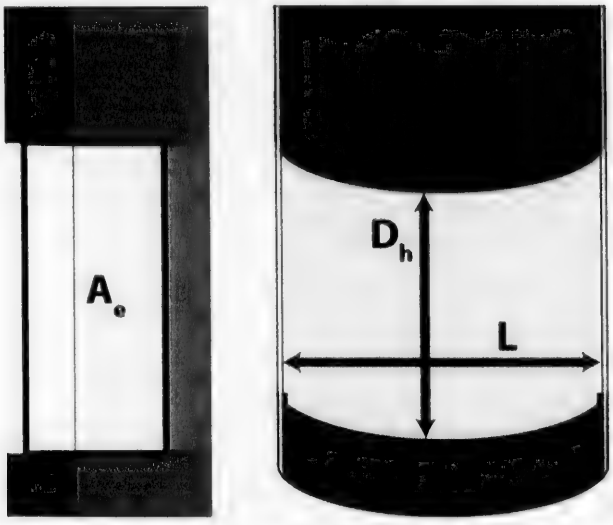


Figure A3.3 Radius case, where the distances "D_h" and "L," and the area "A_e," are representative of the planar projections of visible product when viewed at an angle normal to the transparent surface or opening.

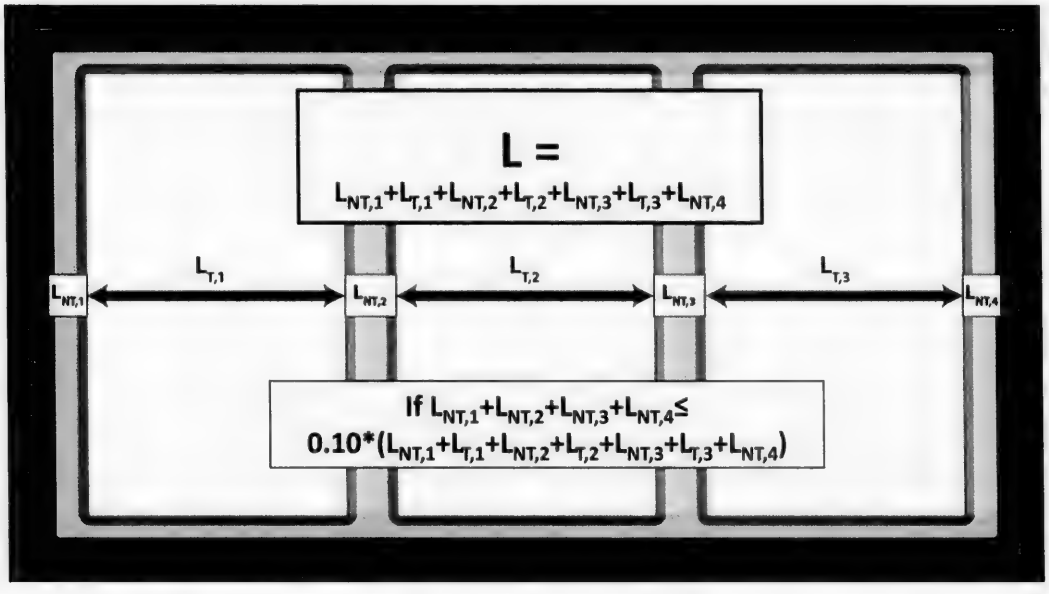


Figure A3.4 Three-door vertical closed transparent display case, where the distance "L" is the collective length of portions of the merchandiser through which product can be seen, including the linear dimension of transparent ($L_{T,i}$) and non-transparent ($L_{NT,i}$) areas, provided the total linear dimension of non-transparent areas are less than 5 inches.

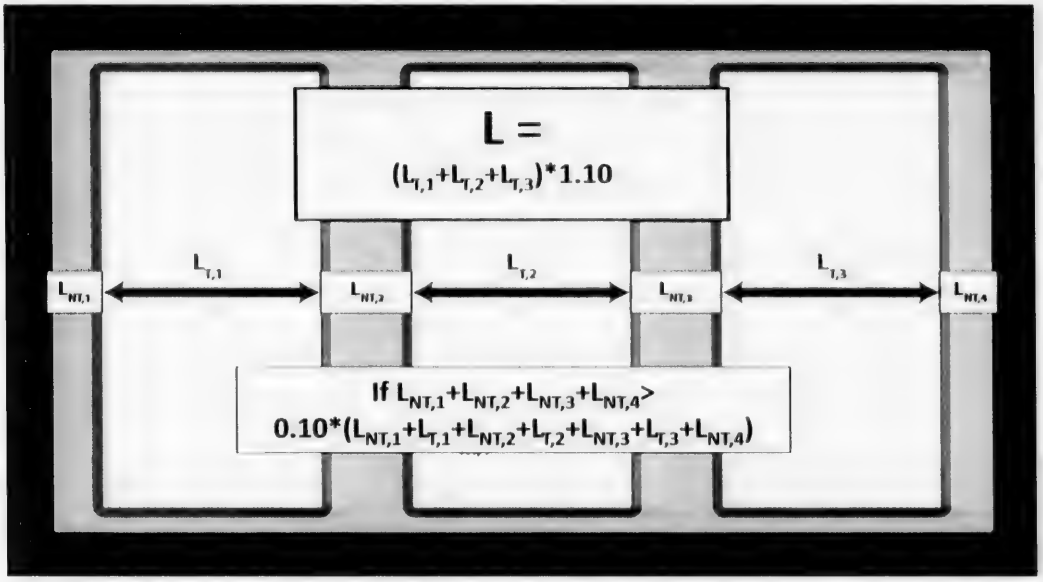


Figure A3.5 Three-door vertical closed transparent display case, where the distance "L" is the collective length of portions of the merchandiser through which product can be seen, including the linear dimension of transparent ($L_{T,i}$) and non-transparent ($L_{NT,i}$) areas, and the total linear dimension of non-transparent areas is greater than 5 inches.

BILLING CODE 6450–01–C

Appendix B to Subpart C of Part 431—Amended Uniform Test Method for the Measurement of Energy Consumption of Commercial Refrigerators, Freezers, and Refrigerator-Freezers

Note: Any representations made on or after March 28, 2017, with respect to the energy use or efficiency of commercial refrigeration equipment must be made in accordance with the results of testing pursuant to this appendix.

1. Test Procedure

1.1. Determination of Daily Energy Consumption. Determine the daily energy consumption of each covered commercial refrigerator, freezer, refrigerator-freezer or ice-cream freezer by conducting the test procedure set forth in the AHRI Standard 1200 (I–P)–2010, section 3, "Definitions," section 4, "Test Requirements," and section 7, "Symbols and Subscripts" (incorporated by reference, see § 431.63). For each commercial refrigerator, freezer, or refrigerator-freezer with a self-contained condensing unit, also use AHRI Standard 1200 (I–P)–2010, section 6, "Rating Requirements for Self-contained Commercial Refrigerated Display Merchandisers and Storage Cabinets." For each commercial refrigerator, freezer, or refrigerator-freezer with a remote condensing unit, also use AHRI Standard 1200 (I–P)-2010, section 5, "Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets."

1.2. Methodology for Determining Applicability of Transparent Door Equipment Families

To determine if a door for a given model of commercial refrigeration equipment is transparent: (1) Calculate the outer door surface area including frames and mullions; (2) calculate the transparent surface area within the outer door surface area excluding frames and mullions; (3) calculate the ratio of (2) to (1) for each of the outer doors; and (4) the ratio for the transparent surface area of all outer doors must be greater than 0.25 to qualify as a transparent equipment family.

1.3. Additional Specifications for Testing of Components and Accessories. All standard components that would be used during normal operation of the basic model in the field shall be installed and used during testing as recommended by the manufacturer and representative of their typical operation in the field unless such installation and operation is inconsistent with any requirement of the test procedure. The specific components and accessories listed in the subsequent sections shall be operated as stated during the test.

1.3.1. Energy Management Systems. Applicable energy management systems may be activated during the test procedure provided they are permanently installed on the case, configured and sold in such a manner so as to operate automatically without the intervention of the operator, and do not conflict with any of other requirements for a valid test as specified in this appendix.

1.3.2. Lighting. All lighting except for customer display signs/lights as described in section 1.3.3 and UV lighting as described in section 1.3.6 of this appendix shall be energized to the maximum illumination level for the duration of testing for commercial refrigeration equipment with lighting except when the unit is equipped with lighting occupancy sensors and controls. If the unit includes an automatic lighting control system, it should be enabled during test. If the unit is equipped with lighting occupancy sensors and controls in should be tested in accordance with section 1.3.2.1 of this appendix.

1.3.2.1. Lighting Occupancy Sensors and Controls. For units with lighting occupancy sensors and/or scheduled lighting controls installed on the unit, determine the effect of the controls/sensors on daily energy consumption by either a physical test or a calculation method and using the variables that are defined as:

CEC_A is the alternate compressor energy consumption (kilowatt-hours);

LEC_{sc} is the lighting energy consumption of internal case lights with lighting occupancy sensors and controls deployed (kilowatt-hours);

P_{li} is the rated power of lights when they are fully on (watts);

$P_{li(off)}$ is the power of lights when they are off (watts);

$P_{li(dim)}$ is the power of lights when they are dimmed (watts);

$TDEC_o$ is the total daily energy consumption with lights fully on, as measured by AHRI Standard 1200 (I–P)–2010 (kilowatt-hours);

t_{dim} is the time period during which the lights are dimmed due to the use of lighting occupancy sensors or scheduled lighting controls (hours);

$t_{dim,controls}$ is the time case lighting is dimmed due to the use of lighting controls (hours);

$t_{dim,sensors}$ is the time case lighting is dimmed due to the use of lighting occupancy sensors (hours);

t_l is the time period when lights would be on without lighting occupancy sensors and/or scheduled lighting controls (24 hours);

t_{off} is the time period during which the lights are off due to the use of lighting occupancy sensors and/or scheduled lighting controls (hours);

$t_{off,controls}$ is the time case lighting is off due to the use of scheduled lighting controls (hours);

$t_{off,sensors}$ is the time case lighting is off due to the use of lighting occupancy sensors (hours); and

t_{sc} is the time period when lighting is fully on with lighting occupancy sensors and scheduled lighting controls enabled (hours).

1.3.2.1.i. For both a physical test and a calculation method, determine the estimated time off or dimmed, t_{off} or t_{dim}, as the sum of contributions from lighting occupancy sensors and scheduled lighting controls that dim or turn off lighting, respectively, as shown in the following equation:

$$t_{off} = t_{off,sensors} + t_{off,controls}$$

$$t_{dim} = t_{dim,sensors} + t_{dim,controls}$$

The sum of t_{sc}, t_{off}, and t_{dim} should equal 24 hours and the total time period during which the lights are off or dimmed shall not exceed 10.8 hours. For cases with scheduled lighting controls, the time the case lighting is off and/or dimmed due to scheduled lighting controls ($t_{off,controls}$ and/or $t_{dim,controls}$, as applicable) shall not exceed 8 hours. For cases with lighting occupancy sensors installed, the time the case lighting is off and/or dimmed due to lighting occupancy sensors ($t_{off,sensors}$ and/or $t_{dim,sensors}$, as applicable) shall not exceed 10.8 hours. For cases with lighting occupancy sensors and scheduled lighting controls installed, the time the case lighting is off and/or dimmed due to lighting occupancy sensors ($t_{off,sensors}$ and/or $t_{dim,sensors}$, as applicable) shall not exceed 2.8 hours and the time the case lighting is off and/or dimmed due to scheduled lighting controls ($t_{off,controls}$ and/or $t_{dim,controls}$, as applicable) shall not exceed 8 hours.

1.3.2.1.ii. If using a physical test to determine the daily energy consumption, turn off the lights for a time period equivalent to t_{off} and dim the lights for a time period equal to t_{dim}. If night curtains are also being tested on the case, the period of lights off and/or dimmed shall begin at the same time that the night curtain is being deployed and shall continue consecutively, in that order, for the appropriate number of hours.

1.3.2.1.iii. If using a calculation method to determine the daily energy consumption—

1.3.2.1.iii.A. Calculate the LEC_{sc} using the following equation:

$$LEC_{sc} = \frac{\left((P_{li} \times t_{sc}) + (P_{li(off)} \times t_{off}) + (P_{li(dim)} \times t_{dim})\right)}{(1{,}000)}$$

1.3.2.1.iii.B. Calculate the CEC_A using the following equation:

$$CEC_A = 0.75 \times \frac{8.4121 \times \left(LEC_{sc} - P_{li} \times {}^{t_l}/_{1000}\right)}{EER}$$

Where EER represents the energy efficiency ratio from Table 1 in AHRI Standard 1200 (I–P)–2010 (incorporated by reference, see § 431.63) for remote condensing equipment or the values shown in the following table for self-contained equipment:

EER FOR SELF-CONTAINED COMMERCIAL REFRIGERATED DISPLAY MERCHANDISERS AND STORAGE CABINETS

Operating temperature class	EER *Btu/W*
Medium	11
Low	7

EER FOR SELF-CONTAINED COMMERCIAL REFRIGERATED DISPLAY MERCHANDISERS AND STORAGE CABINETS—Continued

Operating temperature class	EER *Btu/W*
Ice Cream	5

1.3.2.1.iii.C. For remote condensing units, calculate the revised compressor energy consumption (CEC_R) by adding the CEC_A to the compressor energy consumption (CEC) measured in AHRI Standard 1200 (I–P)–2010 (incorporated by reference, see § 431.63). The CDEC for the entire case is the sum of the CEC_R and LEC_{sc} (as calculated above) and the fan energy consumption (FEC), anti condensate energy consumption (AEC), defrost energy consumption (DEC), and condensate evaporator pan energy consumption (PEC) (as measured in AHRI Standard 1200 (I–P)–2010).

1.3.2.1.iii.D. For self-contained units, the TDEC for the entire case is the sum of total daily energy consumption as measured by the AHRI Standard 1200 (I–P)–2010 (incorporated by reference, see § 431.63) test with the lights fully on ($TDEC_o$) and CEC_A, less the decrease in lighting energy use due to lighting occupancy sensors and scheduled lighting controls, as shown in following equation.

$$TDEC = TDEC_o + CEC_A - \left({}^{(P_{li} \times t_l)}/_{1000} - LEC_{sc}\right)$$

1.3.3. Customer display signs/lights. Do not energize supplemental lighting that exists solely for the purposes of advertising or drawing attention to the case and is not integral to the operation of the case.

1.3.4. Condensate pan heaters and pumps. For self-contained equipment only, all electric resistance condensate heaters and

condensate pumps must be installed and in operation during the test. This includes the stabilization period (including pull-down), steady-state, and performance testing periods. Prior to the start of the stabilization period as defined by ASHRAE 72–2005 (incorporated by reference, see § 431.63), the condensate pan must be dry. Following the start of the stabilization period, allow any condensate moisture generated to accumulate in the pan. Do not manually add or remove water to or from the condensate pan at any time during the test.

1.3.5. Anti-sweat door heaters. Anti-sweat door heaters must be operational during the entirety of the test procedure. Models with a user-selectable setting must have the heaters energized and set to the maximum usage position. Models featuring an automatic, non-user-adjustable controller that turns on or off based on environmental conditions must be operating in the automatic state. If a unit is not shipped with a controller from the point of manufacture and is intended to be used with an automatic, non-user-adjustable controller, test the unit with a manufacturer-recommended controller that turns on or off based on environmental conditions.

1.3.6. Ultraviolet lights. Do not energize ultraviolet lights during the test.

1.3.7. Illuminated temperature displays and alarms. All illuminated temperature displays and alarms shall be energized and operated during the test as they would be during normal field operation.

1.3.8. Condenser filters. Remove any nonpermanent filters that are provided to prevent particulates from blocking a model's condenser coil.

1.3.9. Refrigeration system security covers. Remove any devices used to secure the condensing unit against unwanted removal.

1.3.10. Night curtains and covers. For display cases sold with night curtains installed, the night curtain shall be employed for 6 hours; beginning 3 hours after the start of the first defrost period. Upon the completion of the 6-hour period, the night curtain shall be raised until the completion of the 24-hour test period.

1.3.11. Grill options. Remove any optional non-standard grills used to direct airflow.

1.3.12. Misting or humidification systems. Misting or humidification systems must be inactive during the test.

1.3.13. Air purifiers. Air purifiers must be inactive during the test.

1.3.14. General purpose outlets. During the test, do not connect any external load to any general purpose outlets contained within a unit.

1.3.15. Crankcase heaters. Crankcase heaters must be operational during the test. If a control system, such as a thermostat or electronic controller, is used to modulate the operation of the crankcase heater, it must be utilized during the test.

1.3.16. Drawers. Drawers are to be treated as identical to doors when conducting the DOE test procedure. Commercial refrigeration equipment with drawers should be configured with the drawer pans that allow for the maximum packing of test simulators and filler packages without the filler packages and test simulators exceeding 90 percent of the refrigerated volume. Packing of test simulators and filler packages shall be in accordance with the requirements for commercial refrigerators without shelves, as specified in section 6.2.3 of ASHRAE 72–2005 (incorporated by reference, see § 431.63).

2. Test Conditions

2.1. Integrated Average Temperatures. Conduct the testing required in section 1 of this appendix B, and determine the daily energy consumption at the applicable integrated average temperature in the following table.

Category	Test procedure	Integrated average temperature
(i) Refrigerator with Solid Door(s)	AHRI Standard 1200 (I–P)–2010 [1].	38 °F (±2 °F).
(ii) Refrigerator with Transparent Door(s)	AHRI Standard 1200 (I–P)–2010 [1].	38 °F (±2 °F).
(iii) Freezer with Solid Door(s)	AHRI Standard 1200 (I–P)–2010 [1].	0 °F (±2 °F).
(iv) Freezer with Transparent Door(s)	AHRI Standard 1200 (I–P)–2010 [1].	0 °F (±2 °F).
(v) Refrigerator-Freezer with Solid Door(s)	AHRI Standard 1200 (I–P) 2010 [1].	38 °F (±2 °F) for refrigerator compartment. 0 °F (±2 °F) for freezer compartment.
(vi) Commercial Refrigerator with a Self-Contained Condensing Unit Designed for Pull-Down Temperature Applications and Transparent Doors	AHRI Standard 1200 (I–P) 2010 [1]	38 °F (±2 °F).
(vii) Ice Cream Freezer	AHRI Standard 1200 (I–P) 2010 [1]	−15.0 °F (±2 °F)
(viii) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Self-Contained Condensing Unit and without Doors.	AHRI Standard 1200 (I–P) 2010 [1]	(A) 0 °F (±2 °F) for low-temperature applications. (B) 38.0 °F (±2 °F) for medium-temperature applications.
(ix) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Remote Condensing Unit	AHRI Standard 1200 (I–P) 2010 [1]	(A) 0 °F (±2 °F) for low-temperature applications. (B) 38.0 °F (±2 °F) for medium-temperature applications.

[1] Incorporated by reference, see § 431.63.

2.2. Lowest Application Product Temperature. If a unit of commercial refrigeration equipment is not able to be operated at the integrated average temperature specified in the table in paragraph 2.1 of this appendix, test the unit at the lowest application product temperature (LAPT), as defined in § 431.62. For units equipped with a thermostat, LAPT is the lowest thermostat setting. For remote condensing equipment without a thermostat or other means of controlling temperature at the case, the lowest application product temperature is the temperature achieved with the dew point temperature (as defined in AHRI Standard 1200 (I–P)–2010 (incorporated by reference, see § 431.63)) set to 5 degrees colder than that required to maintain the manufacturer's lowest specified application temperature.

2.3. Testing at NSF Test Conditions. For commercial refrigeration equipment that is also tested in accordance with NSF test procedures (Type I and Type II), integrated average temperatures and ambient conditions used for NSF testing may be used in place of the DOE-prescribed integrated average temperatures and ambient conditions provided they result in a more stringent test. That is, the measured daily energy consumption of the same unit, when tested at the rating temperatures and/or ambient conditions specified in the DOE test procedure, must be lower than or equal to the measured daily energy consumption of the unit when tested with the rating temperatures or ambient conditions used for NSF testing. The integrated average temperature measured during the test may be lower than the range specified by the DOE applicable temperature specification provided in paragraph 2.1 of this appendix, but may not exceed the upper value of the specified range. Ambient temperatures and/or humidity values may be higher than those specified in the DOE test procedure.

3. Volume and Total Display Area

3.1. Determination of Volume. Determine the volume of a commercial refrigerator, freezer, refrigerator-freezer, or ice-cream freezer using the method set forth in the HRF–1–2008 (incorporated by reference, see § 431.63), section 3.30, "Volume," and sections 4.1 through 4.3, "Method for Computing Refrigerated Volume of Refrigerators, Refrigerator-Freezers, Wine Chillers and Freezers."

3.2. Determination of Total Display Area. Determine the total display area of a commercial refrigerator, freezer, refrigerator-freezer, or ice-cream freezer using the method set forth in ARI Standard 1200–2006 (incorporated by reference, see § 431.63), but disregarding the specification that "transparent material (≥65% light transmittance) in Appendix D. Specifically, total display area shall be the sum of the projected area(s) of visible product, expressed in ft^2 (*i.e.*, portions through which product can be viewed from an angle normal, or perpendicular, to the transparent area). Determine L as the interior length of the CRE model, provided no more than 5 inches of that length consists of non-transparent material. For those cases with greater than 5 inches of non-transparent area, L shall be determined as the projected linear dimension(s) of visible product plus 5 inches of non-transparent area.

See Figures A3.1, A3.2, and A3.3 as examples of how to calculate the dimensions associated with calculation of total display area. In the diagrams, D_h and L represent the dimensions of the projected visible product.

BILLING CODE 4500 01–P

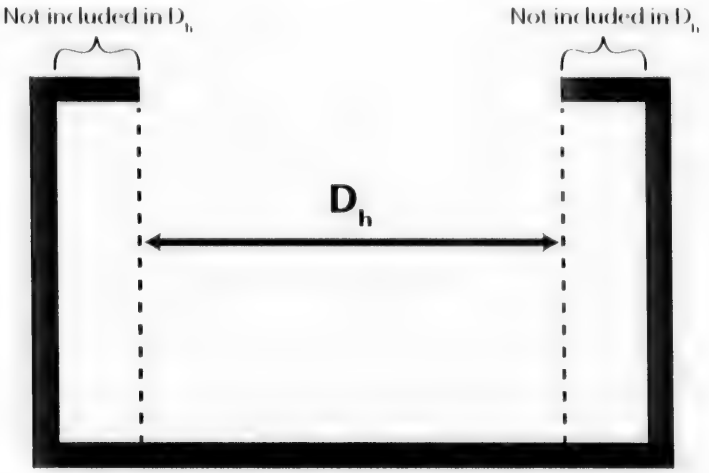


Figure A3.1 Horizontal open display case, where the distance "D_h" is the dimension of the projected visible product.

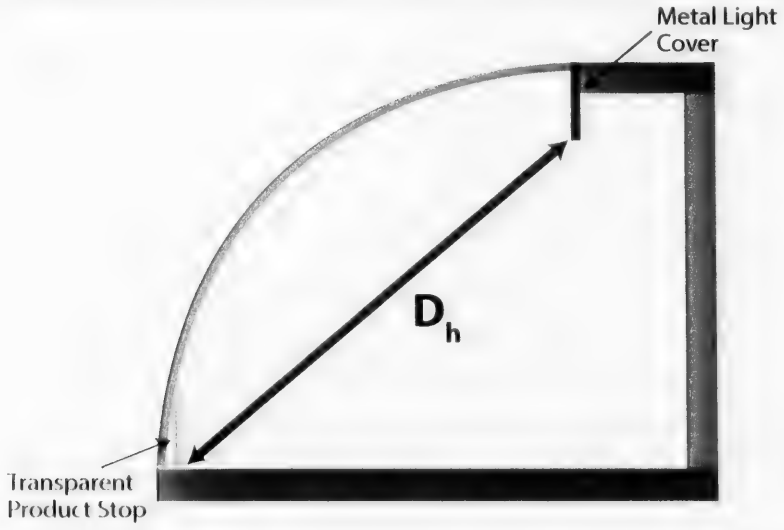


Figure A3.2 Service over counter display case, the distance "D_h" is the dimension of the projected visible product, that being the dimension transverse to the length of the case through which product can be viewed, excluding areas of the product zone that cannot be viewed as part of a direct projection through the glass front.

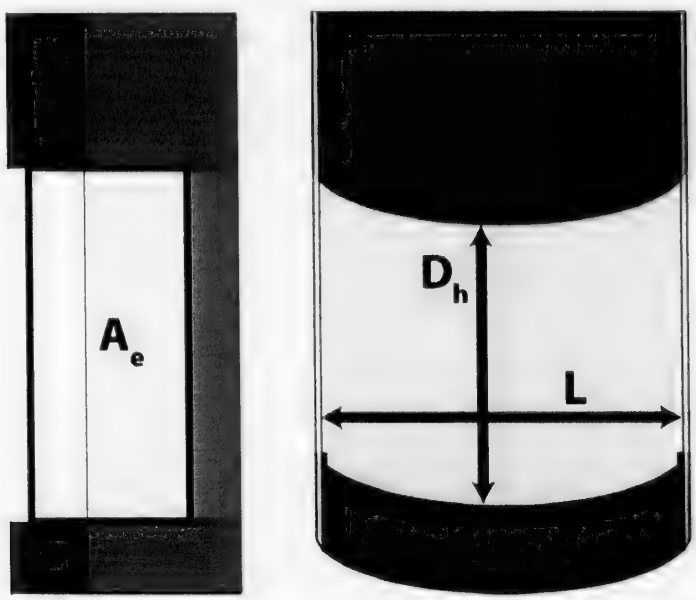


Figure A3.3 Radius case, where the distances "D_h" and "L," and the area "A_e," are representative of the planar projections of visible product when viewed at an angle normal to the transparent surface or opening.

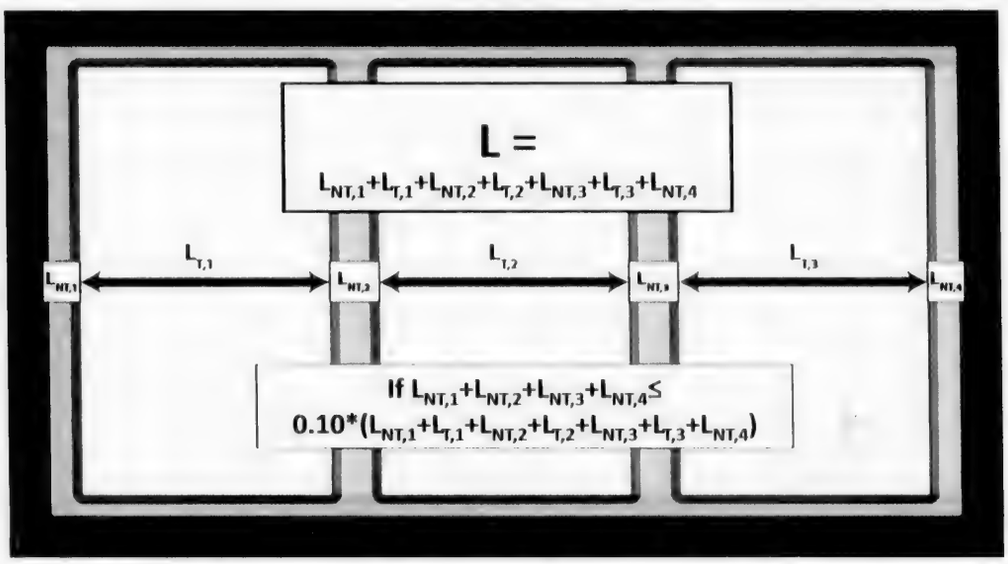


Figure A3.4 Three-door vertical closed transparent display case, where the distance "L" is the collective length of portions of the merchandiser through which product can be seen, including the linear dimension of transparent ($L_{T,i}$) and non-transparent ($L_{NT,i}$) areas, provided the total linear dimension of non-transparent areas are less than 5 inches.

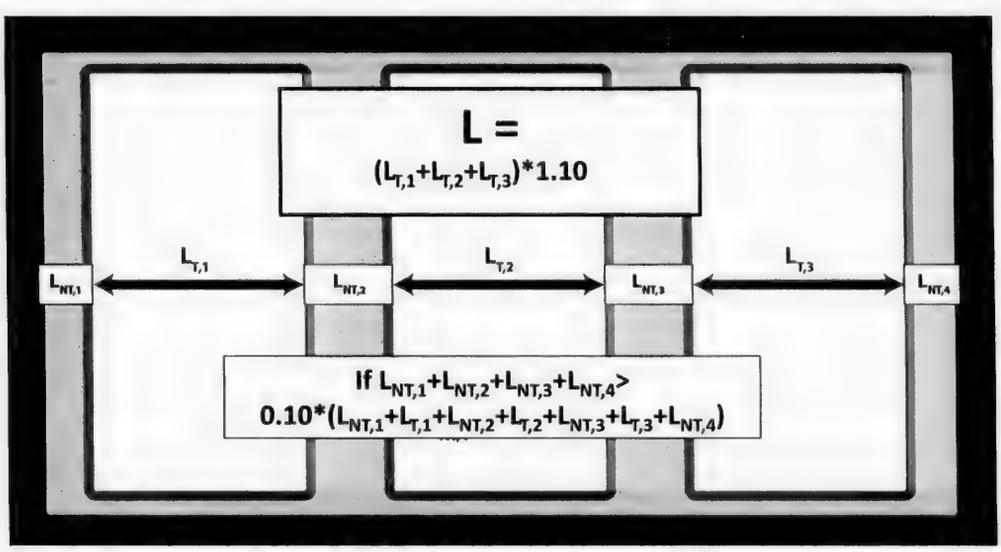


Figure A3.5 Three-door vertical closed transparent display case, where the distance "L" is including the linear dimension of transparent ($L_{T,i}$) and non-transparent ($L_{NT,i}$) areas, and the total linear dimension of non-transparent areas is greater than 5 inches.

[FR Doc. 2014–08640 Filed 4–18–14; 8:45 am]
BILLING CODE 6450–01–C

FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Part V

Department of Energy

10 CFR Parts 429 and 430
Energy Conservation Program: Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2012–BT–TP–0016]

RIN 1904–AC76

Energy Conservation Program: Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: On July 10, 2013, the U.S. Department of Energy (DOE) issued a notice of proposed rulemaking (NOPR) to amend the test procedures for refrigerators, refrigerator-freezers, and freezers. That proposed rulemaking serves as the basis for this action. This final rule amends the test procedure that will be required for the testing of these products starting on September 15, 2014. The amendments include test procedures for products with multiple compressors and an alternative method for measuring and calculating energy consumption for refrigerator-freezers and refrigerators with freezer compartments. DOE is also amending certain aspects of the test procedure in order to ensure better test accuracy and repeatability. This final rule does not address the proposal's approach regarding the measurement of energy use associated with ice making, nor does it address the proposed treatment of built-in products, as DOE plans to address these topics in a future rule.

DATES: The effective date of this rule is May 21, 2014. Manufacturers will be required to use the amendments made in this rule to rate their products starting October 20, 2014.

The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of May 21, 2014.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at regulations.gov. All documents in the docket are listed in the regulations.gov index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-TP-0016*. This is a link to the docket Web page for this final rule on the regulations.gov site. The regulations.gov Web page contains simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–1317. Email: *Lucas.Adin@ee.doe.gov*.

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

This final rule incorporates by reference into part 430 the following standard:

AS/NZS 44474.1:2007, Performance of household electrical appliances—Refrigerating appliances, Part 1: Energy consumption and performance, Second edition, published August 15, 2007.

Interested parties can purchase copies of Australian/New Zealand standards at *http://www.standards.org.au/SearchandBuyAStandard/Pages/default.aspx*.

Table of Contents

I. Authority and Background
II. Summary of the Final Rule
III. Discussion
A. Products Covered by the Final Rule
B. Compliance Dates for the Amended Test Procedures
C. Test Procedure Amendments Incorporated in This Final Rule
1. Multiple compressor Test
2. Triangulation
3. Anti Circumvention Language
4. Incomplete Cycling
5. Correction of Temperature Measurement Period
6. Mechanical Temperature Controls
7. Ambient Temperature Gradient
8. Elimination of Reporting of Product Height
9. Definitions Associated With Defrost Cycles
10. Measurement of Product Volume Using Computer Aided Design Models
11. Corrections to Temperature Setting Logic Tables
12. Minimum Compressor Run Time Between Defrosts for Variable Defrost Models
13. Treatment of "Connected" Products
14. Changes to Confidentiality of Certification Data
15. Package Loading
16. Product Clearance to the Wall During Testing
17. Other Minor Corrections
18. Relocation of Shelving for Temperature Sensors
D. Other Matters Related to the Test Procedure and Discussion of Proposals not Adopted in this *Final Rule*
1. Icemaking Test Procedure
2. Built-In Refrigeration Products
3. Specific Volume Measurement Issues
4. Treatment of Products That Are Operable as a Refrigerator or Freezer
5. Stabilization Period
E. Compliance With Other EPCA Requirements
1. Test Burden
2. Changes in Measured Energy Use
3. Standby and Off Mode Energy Use
IV. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
M. Congressional Notification
N. Approval of the Office of the Secretary

I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, et seq.; "EPCA" or "the Act") sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210 (Dec. 18, 2012).) Part B of title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309, as codified), establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles." These consumer products include refrigerators, refrigerator freezers, and freezers (collectively, "refrigeration products"), the subject of this final rule. (42 U.S.C. 6292(a)(1))

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for (1) certifying to DOE that their products comply with the

applicable energy conservation standards adopted under EPCA, and (2) making representations about the efficiency of those products. Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA.

By way of background, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA by including, among other things, performance standards for refrigeration products. (42 U.S.C. 6295(b)) On November 17, 1989, DOE amended these performance standards for products manufactured on or after January 1, 1993. 54 FR 47916. DOE subsequently published a correction to revise these new standards for three product classes. 55 FR 42845 (October 24, 1990). DOE again updated the performance standards for refrigeration products on April 28, 1997, for products manufactured starting on July 1, 2001. 62 FR 23102.

EISA 2007 amended EPCA by requiring DOE to publish a final rule determining whether to amend the energy conservation standards for refrigeration products manufactured starting in 2014. (42 U.S.C. 6295(b)(4)) Consistent with this requirement, DOE initiated an effort to consider amendments to the standards for refrigeration products. As part of this effort, DOE issued a framework document on September 18, 2008, that discussed the various issues involved with amending the standards and potential changes to the test procedure. 73 FR 54089. DOE later prepared preliminary analyses that examined in greater detail the impacts amended standards would be likely to have on a national basis. DOE published a notice of public meeting (NOPM) to initiate a discussion of these analyses, 74 FR 58915 (Nov. 16, 2009), and held a public meeting on December 10, 2009, to discuss its preliminary findings. At that meeting, and in submitted written comments, interested parties indicated that the energy conservation standards for refrigeration products should address the energy use associated with automatic icemakers. They added, however, that a test procedure to measure icemaking energy use had not yet been sufficiently developed to provide a basis for the standards. (Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2008–BT–STD–0012; American Council for an Energy Efficient Economy (ACEEE), No. 46 at p. 1; California Investor Owned Utilities (IOUs), No. 39 at p. 2; LG, No. 44 at pp. 2–3; Natural Resources Defense Council (NRDC), No. 42 at p. 2; Northeast Energy Efficiency Partnership (NEEP), No. 41 at p. 1; Northwest Power and Conservation Council (NPCC), No. 36 at p. 1; Sub-Zero, No. 43 at pp. 2–3; Appliance Standards Awareness Project (ASAP), Public Meeting Transcript, No. 30 at pp. 28–29; Association of Home Appliance Manufacturers (AHAM), No. 37 at p. 2; General Electric, No. 40 at p. 1)

DOE also initiated a test procedure rulemaking to help address a variety of test procedure-related issues identified in the energy conservation standard rulemaking's framework document by publishing a notice of proposed rulemaking (NOPR) on May 27, 2010. 75 FR 29824 (hereafter referred to as "the May 2010 NOPR"). The May 2010 NOPR proposed to use a fixed value of 84 kilowatt-hours (kWh) per year to represent the icemaking energy use for those refrigeration products equipped with automatic icemakers. The NOPR also indicated that DOE would consider adopting an approach based on testing to determine icemaking energy use if a suitable test procedure could be developed. (*Id.* at 29846–29847) A broad group of stakeholders [1] submitted a joint comment supporting DOE's proposal to use a temporary fixed placeholder value to represent the energy use of automatic icemakers. It also urged DOE to initiate a rulemaking no later than January 1, 2012, and publish a final rule no later than December 31, 2012, to amend the test procedures to incorporate a laboratory-based measurement of icemaking energy use. The joint comment further recommended that DOE publish a final rule by July 1, 2013, and amend the energy conservation standards scheduled to take effect in 2014 to account for the differences in energy use of icemakers measured using the new test procedure as compared with the 84 kWh per year fixed placeholder value. (Test Procedure for Refrigerators, Refrigerator Freezers, and Freezers, Docket Number EERE–2009–BT–TP–0003; Joint Comment, No. 20 at p. 6)

In keeping with the timeline suggested in the joint comment, AHAM provided DOE in early January 2012 with a draft test procedure that could be used to measure automatic icemaker energy usage. (AHAM Refrigerator, Refrigerator-Freezer and Freezer Ice Making Energy Test Procedure, Revision 1.0—12/14/11,[2] No. 4) Subsequently, consistent with the suggestions made by commenters and DOE's previously stated intentions, DOE initiated work to develop the NOPR that was published on July 10, 2013. Prior to the NOPR's publication, AHAM had drafted a revised test procedure and submitted it to DOE for consideration on July 18, 2012. (AHAM Refrigerator, Refrigerator-Freezer and Freezer Ice Making Energy Test Procedure, Revision 2.0—7/10/12,[3] No. 5) The proposal in the July 10, 2013 NOPR ("July 2013 NOPR") sought to improve the accuracy of certain aspects of the test procedure that DOE had recently promulgated in 2012. The NOPR proposed a method for measurement of the energy usage associated with icemaking, which was based on the revised approach suggested by AHAM. The NOPR also proposed several other test procedure amendments designed to clarify the test procedures, adopt a test method for multiple-compressor products based on an approach DOE had previously permitted certain manufacturers to use through test procedure waivers, and allow use of an alternative test method for products with both fresh food and freezer compartments with separate temperature controls.

In response to the NOPR, AHAM submitted comments to DOE requesting that DOE grant its members more time to respond to (1) the proposal for measurement of energy usage associated with icemaking and (2) DOE's request for comment regarding testing of built in products in a built in configuration. (AHAM, No. 24 at p. 1) DOE granted the comment period extension request for these two topics. See 78 FR 53374 (Aug. 29, 2013). After having carefully considered these additional comments, DOE is finalizing an approach that temporarily declines to address the proposed icemaking test procedure amendments and the comments received regarding built in products, while implementing the remainder of its proposal.

Based on available data, this final rule is not expected to alter the measured energy use of any covered product as measured under the existing test procedures in Appendices A and B. Thus, these changes do not require an amendment to the energy conservation standards with which these products

[1] The signatories to these comments included the Association of Home Appliance Manufacturers, the American Council for an Energy Efficient Economy, the Natural Resources Defense Council, the Alliance to Save Energy, the Alliance for Water Efficiency, the Appliance Standards Awareness Project, the Northwest Power and Conservation Council, the Northeast Energy Efficiency Partnerships, the Consumer Federation of America, the National Consumer Law Center, Earthjustice, and the California Energy Commission.

[2] Subsequently referred to as "AHAM Draft Test Procedure".

[3] Subsequently referred to as "AHAM Revised Draft Test Procedure".

must comply beginning on September 15, 2014. Additional details regarding the adjustments made in this final rule are discussed below.

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE follows when prescribing or amending test procedures for covered products. EPCA provides that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results that measure the energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, if DOE determines that a test procedure amendment is warranted, DOE must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must first determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, EPCA specifies the manner in which to amend the applicable energy conservation standard. (42 U.S.C. 6293(e)(2))

This final rule amends the test procedures that manufacturers must use to demonstrate compliance with the energy conservation standards starting on September 15, 2014 (i.e., 10 CFR part 430, subpart B, appendices A and B). DOE has determined that none of the amendments to the test procedures adopted in this final rule change the measured energy use of the products that will be required to use the prescribed testing methods. DOE's analyses demonstrate that the amendments to Appendices A and B, including the incorporation of an optional ''triangulation'' method, will not affect measured energy use to an extent that would necessitate a change to any of the energy conservation standards for the products that would be affected by this rule. (42 U.S.C. 6293(e)(1)(2)) To demonstrate the effects of these amendments under consideration, the July 2013 NOPR discussed the anticipated impacts adopted by this rule. This evaluation is discussed in further detail in section III.E.2 of this final rule.

Refrigerators and Refrigerator-Freezers

DOE's test procedures for refrigerators and refrigerator-freezers are found at 10 CFR part 430, subpart B, appendices A1 (currently in effect) and A (required for rating products starting September 15, 2014). These procedures are the result of numerous evolutionary steps taken since DOE initially established its test procedures for refrigerators and refrigerator-freezers in a final rule published in the **Federal Register** on September 14, 1977. See 42 FR 46140. See also 78 FR 41612–41613 (July 10, 2013) (detailing the regulatory history of the DOE test procedures for refrigerators and refrigerator-freezers).

On December 16, 2010, DOE issued a final and interim final rule that laid out a revised test procedure for refrigeration products. See 75 FR 78809. That rule established a new Appendix A, via an interim final rule. The new Appendix A included a number of comprehensive changes to help improve the measurement of energy consumption of refrigerators and refrigerator-freezers. Those changes included, among other things: (1) Adding new compartment temperatures and volume adjustment factors, (2) adding new methods for measuring compartment volumes, (3) modifying the long time automatic defrost test procedure to ensure that the test procedure measures all energy use associated with the defrost function, and (4) adding test procedures for products with a single compressor and multiple evaporators with separate active defrost cycles. DOE noted that the compartment temperature changes introduced by Appendix A would significantly impact the measured energy use and affect the calculated adjusted volume and energy factor (i.e., adjusted volume divided by energy use) values. Lastly, the interim final rule addressed icemaking energy use by including a fixed value for manufacturers to add when calculating the energy consumption of those products equipped with an automatic icemaker. Using available data submitted by the industry, this value was set at 84 kWh per year. See 75 FR 78810, 78859 and 78871 (Dec. 16, 2010) (specifying the daily value of 0.23 kWh for products equipped with an automatic icemaker).[4]

Freezers

DOE's test procedures for freezers are found at 10 CFR part 430, subpart B, appendices B1 (currently in effect) and B (required for the rating of products starting in 2014). As with refrigerators and refrigerator-freezers, these procedures are the result of numerous evolutionary steps taken since DOE established its test procedures for freezers in a final rule published in the **Federal Register** on September 14, 1977. See 42 FR 46140. See also 78 FR 41612–41613 (July 10, 2013) (detailing the regulatory history of the DOE test procedures for freezers).

As with refrigerators and refrigerator-freezers, the December 16, 2010 notice also clarified testing requirements for freezers under Appendix B1 and created a new Appendix B, the latter of which must be used starting in September 2014. That new test procedure changed a number of aspects of the procedure detailed in Appendix B1, including, among other things: (1) The freezer volume adjustment factor, (2) methods for measuring compartment volumes, and (3) the long time automatic defrost test procedure. In addition, Appendix B addresses icemaking energy use by implementing for freezers the same procedure adopted for refrigerator freezers; parties must apply a fixed energy use value when calculating the energy consumption of freezers with automatic icemakers. 75 FR 78810

Finalization of the Test Procedure Rulemaking for Products Manufactured Starting in 2014

The December 2010 interim final rule established comprehensive changes to the manner in which refrigeration products are tested by creating new Appendices A and B. In addition to the changes discussed above, these new appendices also include the modifications to Appendices A1 and B1 that were finalized and adopted on December 16, 2010. DOE provided an initial comment period on the interim final rule, which ended on February 14, 2011, and subsequently reopened the comment period on September 15, 2011 (76 FR 57612) to allow for further public feedback in response to the promulgation of the final energy conservation standards that were published on the same day. 76 FR 57516. This re-opening permitted interested parties to comment on the interplay between the test procedures and the energy conservation standards, and provided DOE with additional information to consider before making any final changes to the test procedures of Appendices A and B prior to their mandatory use. 76 FR 57612–57613. That comment period ended on October 17, 2011.

DOE also considered comments related to a petition for a test procedure waiver that had a direct bearing on elements of the test procedures used in

[4] Multiplying 0.23 by 365 days per year yields 84 kWh.

Appendix A. See 76 FR 16760 (March 25, 2011) (Petition No. RF–018, Samsung Electronics America, Inc. (Samsung)).

During the comment periods that DOE provided, interested parties raised a number of issues for DOE to consider. The submitted comments included the following suggested changes: (1) Modifying the test procedure for multiple-compressor systems to reduce test burden; (2) modifying the test period for the second part of the test for products with long-time or variable defrost to assure proper accounting of all energy use associated with defrost; (3) developing separate test procedures and standards for products combining wine storage with fresh food compartments; (4) allowing an alternative three test interpolation approach as an option to potentially improve measurement accuracy at the cost of greater test burden for those manufacturers choosing to use it; (5) adjusting the test procedure's anti circumvention provisions; and (6) adjusting the default values for CT_L and CT_M (the longest and shortest duration of compressor run time between defrosts) used in the energy use equations for products that do not have defined values for those parameters in their control algorithm. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE–2009–BT–TP–0003; Sub Zero, No. 42; AHAM, No. 43, Whirlpool, No. 44) Stakeholders recommended that all of these changes be adopted as part of Appendices A and B. In the final rule published on January 25, 2012 (''January 2012 Final Rule''), DOE considered the changes recommended by stakeholders. 77 FR 3559. DOE declined to adopt certain changes recommended for Appendices A and B because the nature of those recommendations had not, in DOE's view, been presented in a manner that would have afforded the public with a sufficient opportunity to comment on those issues. (Id.)

Nevertheless, after finalizing the rule setting out Appendices A and B, DOE reviewed these various suggestions and considered including them as part of the test procedures for refrigeration products. As a result of this review, DOE proposed some of these recommended amendments in the July 2013 NOPR. In that NOPR, DOE proposed (1) modified test procedures for products with multiple-compressor systems, (2) use of an alternative method for measuring and calculating energy use at standardized temperatures for refrigerator-freezers and refrigerators with freezer compartments, and (3) the modification of the anti-circumvention language currently applicable to testing of refrigerators, refrigerator-freezers, and freezers. This final rule adopts these proposed amendments into the test procedures.

Waivers

DOE granted a limited number of petitions for waiver from the test procedures for refrigeration products between the publication of the December 2010 final rule and the publication of the July 2013 NOPR. On January 10, 2012, DOE published a decision and order (D&O) responding to two waiver petitions from Samsung addressing products with multiple defrost cycle types. 77 FR 1474. That notice prescribed a procedure to account for the energy use from the multiple defrost cycles of a single compressor based system. The approach is identical to the procedure established for Appendix A in the January 25, 2012 Final Rule. 77 FR 3559. DOE also issued a D&O that granted a waiver to GE Appliances (GE) to use the same test procedure for similar products. See 77 FR 75426 (Dec. 20, 2012) (GE waiver) In effect, these waivers permit these companies to test certain products that, due to their characteristics, cannot be tested according to the prescribed test procedure (i.e., Appendix A1) or for which use of the prescribed test procedure evaluates the model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. (*See* 10 CFR 430.27(a)(1))

DOE also granted a waiver to Sub Zero, Inc. (Sub Zero) to address that company's multiple compressor products. See 77 FR 5784 (Feb. 6, 2012) (Sub Zero waiver). That waiver permitted Sub-Zero to use the same test procedure that AHAM had recommended that DOE adopt for both Appendix A1 and Appendix A. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE–2009–BT–TP–0003; AHAM, No. 43 at pp. 2–3) DOE also granted similar waivers permitting the use of the same procedure to GE, LG, and Samsung.[5] This final rule adopts a test procedure for multiple-compressor products that is based on the initial Sub-Zero waiver procedure.

Finally, on August 16, 2012, DOE granted a waiver to Sanyo E&E Corporation (Sanyo) to address a hybrid refrigeration product, i.e., a product combining wine storage compartments in a product otherwise defined by DOE as a refrigerator. See 77 FR 49443 (D&O granting Sanyo's petition for waiver (Sanyo waiver)). The waiver cites a guidance document that DOE published in February 2011, which indicates that products combining a wine storage compartment and a fresh food compartment are considered refrigerators and should be tested as such.[6] The waiver further explains that the Sanyo hybrid product cannot be tested with its wine storage compartment at the standardized temperature required for testing refrigerators using Appendix A1 (i.e., 38 °F), and that doing so would result in a non-representative energy use measurement. Hence, DOE granted Sanyo's request that it be allowed to test its product using a standardized temperature of 55 °F for the wine storage compartment. *Id.* Because the Sanyo waiver is based upon testing in accordance with the Appendix A1 test procedure, it will terminate on September 15, 2014, when use of the Appendix A1 test procedure is no longer permitted.

After DOE grants a waiver, the agency must, pursuant to its waiver provisions, initiate a rulemaking to amend its regulations to eliminate the continued need for the waiver. 10 CFR 430.27 (m) This final rule addresses this requirement for the Sub Zero waiver by amending Appendix A to include a test procedure for multiple compressor products that is based on the Sub Zero waiver procedure. The Sub Zero, Samsung, LG, and GE waivers for multiple compressor products will terminate on September 15, 2014, the same date that manufacturers must use the test procedures in Appendix A for testing. DOE does not currently anticipate that additional products on the market with single-compressor based systems using multiple defrost cycles will be introduced prior to September 15, 2014, since it is DOE's understanding that this is a system design unique to those manufacturers who are currently covered by these waivers. Hence, at this time, DOE will not amend Appendix A1 to include this particular alternative test procedure.

Stakeholder Summary

At the public meeting held on July 25, 2013, DOE discussed the NOPR, detailed the proposed revisions, and solicited oral comments from meeting

[5] See 78 FR 18327 (March 26, 2013) (LG Decision and Order), 78 FR 35899 (June 14, 2013) (Samsung Decision and Order), and 78 FR 38699 (June 27, 2013) (GE Decision and Order).

[6] This guidance is posted in DOE's online Guidance and FAQ database, and is available for viewing at *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1*.

participants. Numerous stakeholders attended the meeting and/or provided written comments. These parties are identified in Table I.1 below.[7]

TABLE I–1—STAKEHOLDERS THAT SUBMITTED COMMENTS ON THE INTERIM FINAL RULE

Name	Acronym	Type*	Oral comments	Written comments
Association of Home Appliance Manufacturers	AHAM	IR	[ ]	[ ]
BSH Home Appliances Corporation	BSH	M		[ ]
Felix Storch, Inc.	FSI	M		[ ]
GE Appliances & Lighting	GE	M	[ ]	[ ]
Panasonic Appliances Refrigeration Systems Corporation of America.	PAPRSA	M	[ ]	[ ]
American Council for an Energy-Efficient Economy	ACEEE	EA	[ ]	
Sub Zero Group, Inc.	Sub Zero	M		[ ]
Whirlpool Corporation	Whirlpool	M	[ ]	[ ]
Michael Fitzgibbon	Mr. Fitzgibbon	I		[ ]
Allen Cornelison	Mr. Cornelison	I		[ ]
Liebherr-Canada Ltd.	Liebherr	M		[ ]
Underwriters Laboratory	UL	TL	[ ]	

* IR: Industry Representative; M: Manufacturer; EA: Efficiency/Environmental Advocate; I: Individual; TL: Test Laboratory.

II. Summary of the Final Rule

DOE's most recent amendments to the test procedures for refrigeration products made a number of significant improvements. Even with these amendments, there remained a number of pending issues that DOE was unable to address. This final rule addresses those remaining issues and finalizes the test procedure for manufacturers to use when certifying their basic models as compliant with the energy conservation standards starting on September 15, 2014. In finalizing these procedures, DOE accounted for comments interested parties made in response to the July 2013 NOPR. These amendments will not result in a significant change in measured energy use as compared with the test procedures as established by the previous January 2012 Final Rule.

Some of the improvements in this final rule could also have been implemented in the current test procedures as well as the procedures that will be required for certification starting September 15, 2014. However, the current test procedures will continue to be used only for a limited time. Hence, DOE did not make any substantive amendments to these test procedures, which are contained in Appendices A1 and B1. (The notice does, however, include amendments that would correct certain cross-references in these appendices to sections of 10 CFR Part 429.) The amendments and issues that have been adopted are summarized in Section III.

This rule makes a series of changes that include incorporation of a multiple-compressor test procedure, an optional triangulation test procedure, and other clarifications to the test procedure. This rulemaking does not address the ice making test procedure and built-in testing topics due to the more complex analysis required to evaluate the merits of the proposals. DOE also extended the comment period for those topics, as requested by interested parties. DOE expects to publish a separate final rule addressing those topics after the extended comment period comes to a close.

III. Discussion

This final rule contains a number of amendments to the refrigerator, refrigerator-freezer, and freezer test procedures. The following section discusses in further detail the various issues addressed by this final rule. Table III–1 below lists the subsections of this section and indicates where the amendments are located. Section A identifies the products covered by the final rule; section B specifies the compliance dates that apply to the amendments; section C discusses the key test procedure amendments made in this final rule; section D discusses additional test procedure topics, including DOE interpretations of certain test procedure issues; and section E discusses compliance of the final rule with other EPCA requirements.

TABLE III–1—DISCUSSION SUBSECTIONS

Section	Title	Affected appendices	
		A	B
III.A	Products Covered by the Final Rule	No changes	
III.B	Compliance Dates for the Amended Test Procedures	X	X
III.C.1	Multiple-compressor Test	X	
III.C.2	Triangulation	X	
III.C.3	Anti-Circumvention Language	*	
III.C.4	Incomplete Cycling	X	X
III.C.5	Correction of Temperature Measurement Period	X	X
III.C.6	Mechanical Temperature Controls	X	X
III.C.7	Ambient Temperature Gradient	X	X

[7] Because the comments of Michael Fitzgibbon and Allen Cornelison address subjects not associated with the proposals detailed in the NOPR, this rule will not discuss those comments in detail.

TABLE III–1– DISCUSSION SUBSECTIONS—Continued

Section	Title	Affected appendices	
		A	B
III.C.8	Elimination of Reporting of Product Height	X	X
III.C.9	Definitions Associated with Defrost Cycles	**	
III.C.10	Measurement of Product Volume using Computer-Aided Design Models	X	X
III.C.11	Corrections to Temperature Setting Logic Tables	X	X
III.C.12	Default Minimum Compressor Run-Time Between Defrosts for Variable Defrost Models.	X	X
III.C.13	Treatment of "Connected" Products	X	X
III.C.14	Changes to Confidentiality of Certification Data	***	
III.C.15	Package Loading	.....	X
III.C.16	Rear Clearance During Testing	X	X
III.C.17	Other Minor Corrections †	X	X
III.C.19	Relocation of Shelving	X	X
III.D.1	Icemaking	No changes	
III.D.2	Built-In Products		
III.D.3	Volume Measurement Issues		
III.D.4	Treatment of Products That are Operable as a Refrigerator or Freezer		
III.D.5	Stabilization Period		
III.E.1	Test Burden		
III.E.2	Change in Measured Energy Use		
III.E.3	Standby and Off Mode Energy Use		

*This amendment appears in 10 CFR 430.23, but affects testing using all four appendices.
**This amendment appears in 10 CFR 429.14, but affects certification reporting for products tested using Appendices A and B.
***This amendment includes proposed modifications to 10 CFR 429.14.
† This section also discusses an amendment to 10 CFR 430.2.

A. Products Covered by the Final Rule

These amendments cover those products that meet the definition for refrigerator, refrigerator-freezer, or freezer, as codified in 10 CFR 430.2. The definitions for refrigerator and refrigerator-freezer were amended in the December 16, 2010 final rule. See 75 FR 78817 and 78848.

B. Compliance Dates for the Amended Test Procedures

The amendments in this final rule are made to sections 429.14, 429.72, 429.134, 430.2, 430.3, and 430.23 and in Appendices A and B. Manufacturers are required to use the amendments made to Appendices A and B to rate their products starting October 20, 2014.

Some of the proposed amendments that aim to improve measurement accuracy by clarifying certain aspects of the test procedures or to reduce test burden could potentially be considered for adoption in the current test procedures (*i.e.*, Appendices A1 and B1). However, these appendices will be obsolete after September 15, 2014, so DOE did not propose to amend them. DOE requested comments on this approach in the July 2013 NOPR. No stakeholders indicated that DOE should adopt any of the proposed amendments in the current test procedures. Whirlpool commented that it did not support making changes to Appendices A1 and B1. (Whirlpool, No. 27 at p. 2) This final rule does not make any changes to the current test procedures of Appendices A1 and B1.

The proposed amendments that apply to Appendices A and B will be effective 30 days after issuance of a final rule, but manufacturers will not be required to use this procedure until September 15, 2014. Beginning on that date, Appendices A and B will be mandatory for certifying that products comply with the applicable energy conservation standards and for making representations regarding the energy use or operating costs of covered refrigeration products. Pursuant to guidance issued by DOE on June 29, 2012,[8] DOE permits manufacturers to use Appendices A and B before this 2014 date if they choose to do so, provided that they indicate in their certification submissions that their ratings are based on Appendix A or B and that the products comply with the 2014 standards.

[8] This and other DOE guidance documents are located in the Guidance and Frequently Asked Questions database, at *http://www1.eere.energy.gov/guidance/default.aspx?pid=28&spid=1*.

C. Test Procedure Amendments Incorporated in This Final Rule

1. Multiple-compressor Test

DOE proposed to replace the existing dual compressor test procedures in Appendix A with test procedures for multiple-compressor products, based on procedures developed by Sub-Zero and AHAM and permitted for use in test procedure waivers for Sub-Zero (*see* 77 FR 5784 (Feb. 6, 2012)), GE (*see* 78 FR 38699 (June 27, 2010)), Samsung (*see* 78 FR 35901 (June 14, 2013)), and LG Electronics, Inc. (*see* 78 FR 18327 (Mar. 26, 2013)). The July 2013 NOPR discussed the necessity of using a unique test procedure to accommodate multiple-compressor products to reduce the so-called "truncation error" that can occur when measuring the energy use of multiple compressors whose cycles are not synchronized. 78 FR 41629–30 (July 10, 2013). The following sections discuss each aspect of DOE's proposal and the changes finalized in this final rule.

Multiple-Compressor Definition

DOE proposed to define the term "multiple-compressor" in lieu of the term "dual compressor" to provide general applicability to all refrigeration products that have more than one compressor. Although DOE is not aware

of any current refrigeration products with more than two sealed compressor systems, taking this broader approach in defining this particular term would ensure that products using more than two sealed refrigeration systems that might be manufactured and sold in the future are addressed by DOE's regulations. Because DOE did not receive any comments objecting to this proposal, and for the reasons discussed above, DOE is adopting its proposed definition of "multiple-compressor" products in a new section 1.16 of Appendix A.

Temperature Cycles

DOE proposed to allow test periods for multiple-compressor refrigeration products to be determined based on compartment temperatures as an alternative to relying on compressor cycles. For multiple-compressor products, it may be difficult to determine which individual compressor is associated with events such as compressor cycle starts and stops. Thus, reliably identifying individual compressor cycles by examining power measurement data may prove difficult. As an alternative, DOE proposed to permit test periods to be selected based on the cycles of the compartment temperatures associated with the compressor systems. In proposing this alternative approach, DOE expressed its belief that complete temperature cycles are equivalent to complete compressor cycles because temperature cycle endpoints coincide nearly exactly with the relevant compressor cycle endpoints. Since the operation of the compressor causes the refrigeration system to reduce compartment temperatures, compressor and temperature cycles are inherently equivalent. In general, these temperature cycles would coincide with their corresponding compressor cycles (*i.e.*, the compartment temperature falls as the compressor operates and rises when the compressor is not operating). However, using an approach based on temperature cycles may be easier to apply because the compartment temperature measurements of separate compressor systems are not combined like total product power inputs are, potentially making identification of test periods easier than when using the power input measurements to identify compressor cycles.

In its comments on the NOPR, GE opposed DOE's proposal. It indicated that using temperature cycles instead of compressor cycles to determine the endpoints of a test period could impact the measured energy use. GE provided data demonstrating that the impact on the overall energy use measurement could be as large as 9.6 percent in some cases. (GE, No. 31 at p. 2) AHAM also opposed DOE's proposal for five reasons: (1) Temperature and compressor cycles do not always correlate with each other, (2) selecting temperature cycle starts and stops are more subjective than for compressor cycles, (3) unlike compressor cycles, temperature cycles could not be used for every product, (4) variable speed compressor products may not have true temperature cycles reflective of operation, and (5) software for identifying temperature cycle maxima and minima would be complicated to develop and may rely on compressor cycles. (AHAM, No. 30 at p. 11–12)

DOE notes that it proposed its temperature cycle-based approach based on the belief that the approach may be beneficial in some circumstances, by making identification of appropriate cycles easier. However, the stakeholder comments clearly indicate that allowing this alternative is unnecessary and, in some cases, potentially detrimental to the accuracy of the energy consumption measurement of a given product. Accordingly, DOE is not adopting its proposed temperature cycle approach and is continuing to require that the identification of test periods be accomplished using compressor cycles.

However, DOE will adopt the proposed definition for temperature cycles. As described later in section III.C.9, DOE's definition for "stable operation" allows for confirmation of stability for products with non-cycling compressors that have cycling temperatures; the concept of temperature cycles is needed for this reason and is being adopted.

Measurement Frequency

The current test procedure allows compartment temperature measurements to be taken at up to four minute intervals (*See* Appendix A, sections 2.9 and 5.1.1). This approach, because of its lower measurement precision, permits more truncation error to occur while testing multiple compressor products than would occur with shorter measurement intervals. Truncation error occurs when a test period comprising a whole number of one compressor's cycles includes an incomplete portion of the other compressor's cycles. The test procedures developed by Sub-Zero and AHAM reduce the potential magnitude of truncation error by requiring the measurements of multiple-compressor systems to be recorded at regular intervals not to exceed one minute. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2009–BT–TP–0003, AHAM, No. 43 at p. 3) Therefore, the July 2013 NOPR proposed to decrease the maximum time between subsequent measurements by decreasing the time period between intervals to not exceed one minute in duration when testing multiple-compressor products.

Both AHAM and GE supported DOE's proposal to increase the measurement frequency to at least once per minute. (AHAM, No. 30 at p. 12; GE, No. 31 at p. 3) With no stakeholder opposition to DOE's proposal, DOE is adopting its proposal that the measurement frequency for multiple-compressor products be no less than once per minute to limit truncation error.

Neither the test procedure contained in the dual- and multiple-compressor test procedure waivers (e.g., the Sub-Zero waiver) nor the NOPR proposal explicitly indicated which measurements would be required to be recorded every minute. It is DOE's understanding that the data collected on a once-per-minute basis would include product power input, product energy use, and compartment temperature. These are the measurements that would require higher-frequency collection in order to improve the precision of the energy use measurement: The power input measurement is needed to identify the applicable test period (*i.e.*, the time when compressors stop and start), and the measured energy use and compartment temperature are used in the calculation of annual energy use. To improve the clarity of the data collection requirement, this final rule clarifies that the requirement for once per minute acquisition frequency applies to these three measurements. These changes appear in a new section 4.2.3.1 of Appendix A, which addresses measurement frequency for multiple compressor products.

Stabilization Period

DOE proposed to apply the stabilization requirement of section 2.9 of Appendix A to multiple-compressor products instead of requiring the 24 hour stabilization period that is used in recent waivers. (The stabilization requirement in Appendix A, required for single-compressor products, stipulates that the average rate of temperature change of the product's compartments must not exceed 0.042 °F per hour.) DOE proposed use of the section 2.9 approach for multiple-compressor products to reduce the burden when testing these products, the majority of which achieve stabilization in under 24 hours, and to ensure that

the existing stabilization requirement is met for any product that requires more than 24 hours to achieve stabilization. The proposal would also have allowed the use of temperature cycles rather than compressor cycles to determine steady-state conditions, for example, for products that might have non-cycling compressors but whose compartment temperatures may cycle.

GE and AHAM opposed the DOE proposed stabilization requirements for multiple-compressor products, claiming such products have no true stabilization period. (GE, No. 31 at p. 4; AHAM, No. 30 at p. 13) DOE notes that all products have a period of operation after plug-in or a change in temperature settings during which compartment temperatures gradually approach and eventually equate with, or at least fluctuate near, the targeted temperatures determined by user operable controls. The test procedures have specific provisions to ensure that measurements are made during stable operation. This is true even for the test procedures for multiple-compressor products that are covered under waivers.[9]

Nevertheless, DOE believes that the 24-hour stabilization requirement found in these waivers—and as suggested by commenters—would adequately ensure stabilization is achieved for multiple-compressor products. DOE notes that commenters have suggested that reducing the test burden associated with a 24-hour duration for the stabilization period is less important than avoiding the potential complications that may arise from added test procedure complexity when verifying stability. Therefore, this final rule adopts the longer, but simpler, 24-hour stabilization period for multiple compressor products, as recommended by AHAM and GE. Because the stabilization period will be a fixed number of hours, the proposed use of temperature cycles as an alternative to compressor cycles to define the stabilization period is unnecessary and is not adopted.

First Part of the Test

For multiple-compressor products with at least two cycling compressors, DOE proposed that the first part of the test last at least 24 hours with no defrost cycle interruption. For cases in which defrost cycles do not allow a full 24-hour test period, the July 2013 NOPR proposed allowing a shorter 18-hour test period. In other words, if a potential test period extends to only 18 hours before being interrupted by a defrost, this 18-hour test period could be used as the first part of the test rather than waiting for the next period of operation between defrosts, which would add at least a day to the test time. However, if the initial candidate test period extends fully to 24-hours before being interrupted by a defrost, the full 24 hours would be used for the test period. DOE did not propose to adopt AHAM's approach, which allows aggregating multiple separate segments of running time to increase the total test period time to accrue the minimum of 24 hours. DOE explained that each individual segment of running time would introduce its own truncation error, thus defeating the purpose of requiring a long 24-hour test period. After quantifying the maximum possible truncation error for refrigerators in the DOE test sample, DOE tentatively determined that allowing an 18-hour period would be a reasonable compromise to balance test burden and accuracy.

In response to the DOE proposal, AHAM indicated that DOE's approach would be more complicated than the waiver approach and that some products may require several weeks of testing to satisfy the minimum 18-hour requirement of the proposal. (AHAM, No. 30 at p.14) AHAM also stated that the energy use differences presented in the NOPR showing the difference between AHAM's aggregated approach and the proposed single segment approach were not necessarily entirely attributable to truncation error. (*Id.*) In addition, AHAM stated that DOE may have proposed not to allow multiple segments because DOE is concerned about test circumvention. (*Id.*) AHAM also stated that it did not agree with DOE's characterization of the maximum of one percent error in the energy measurement as insignificant, asserting that such measurement error could represent the difference between a product satisfying or failing to meet the energy conservation standards. (*Id.*)

While a one percent error may, in certain cases, potentially be significant, increasing the precision of a test can also introduce additional test burden, and the competing demands of precision and managing test burden generally require that compromises be made in establishing test procedures. It is for this reason that DOE proposed that the first part of the test be a continuous period of stable operation. As described in the NOPR, DOE's analysis shows that truncation error can approach and/or exceed one percent of the measurement when the first part of the test is allowed to be less than 24 hours and/or when the first part of the test is allowed to include separate time periods, each with an average duration under 24 hours. (The average duration of the time period would be the total test period time divided by the number of time segments used (e.g., the average duration would be 12 hours if two intervals were used to comprise a 24-hour test period).) If two time segments are included in a 24-hour total test period, two truncation events are included, and the potential truncation error is twice as large compared to a single, continuous period of stable operation. Likewise, if three segments are used, the potential truncation error is three times as large.

DOE notes that the analysis presented in the NOPR calculates truncation error directly—it does not represent multiple measurements for which other parameters might affect the measurement, as suggested by AHAM. See 78 FR 41633 (July 10, 2013).

DOE believes that allowing an 18-hour test period would be an acceptable compromise between test precision and test burden in cases in which a defrost interrupts a candidate test period. Rather than require waiting through the defrost and the next 24 hours of steady operation, DOE decided to adopt an approach that allows use of the 18-hour period as the test period for the first part of the test. In so doing, DOE opted to make a small reduction in precision to avoid having to add 24 hours or more test time. On the other hand, if defrosting does not interrupt a candidate test period, allowing it to extend to 24 hours, the additional six hours of test time would be justified to enhance the test precision. This is why DOE proposed to allow the 18 hour test period only when the test period is interrupted by a defrost.

AHAM stated that some products could require weeks of extra testing to sufficiently satisfy even a requirement of an 18 hour minimum duration for the test period. (AHAM, No. 30 at p. 14) However, AHAM did not provide sufficient detail regarding this possibility to allow quantification of the related test burden. To the extent that a product cannot obtain 18 hours of steady operation between defrosts, alternative test methods for such products may have to be developed. As indicated by AHAM, should a one percent error occur with test periods shorter than 18 hours or with test periods comprised of separate running

[9] See, e.g., "Decision and Order Granting a Waiver to GE Appliances From the Department of Energy Residential Refrigerator and Refrigerator Freezer Test Procedures", Case No. RF–029, 78 FR 38699 (June 27, 2013). This waiver test procedure has specific requirements for stability and steady state, including, for example, "Steady State for EP1: The temperature average for the first and last compressor cycle of the test period must be within 1.0 degrees F (0.6 degrees C) of the test period temperature average for each compartment." (*Id.* at pp. 38700–1).

periods, such an error could potentially make the difference between compliance and non-compliance for a borderline-compliant product. (AHAM, No. 30 at p. 15) Consequently, it would be inadvisable to allow the potential error to be greater than this by allowing use of multiple run segments or a reduction in the minimum test period duration. To mitigate this risk, this final rule retains the first-part test period requirements proposed in the NOPR. In response to AHAM's comment regarding circumvention, DOE notes that although the agency is concerned about circumvention, DOE evaluated the proposal primarily based on balancing test precision and test burden.

The July 2013 NOPR also proposed that products with cycling compressors be tested using a test period for the first part of the test comprising a whole number of compressor or temperature cycles of a "primary" compressor. DOE proposed that the freezer compressor would be considered the "primary" compressor if it cycles, and the fresh food compressor would be considered the "primary" compressor if the freezer compressor does not cycle. The test procedures of the multiple-compressor product waivers require that the test period for the first part of the test consist of a whole number of freezer compressor cycles.[10] The proposal was consistent with the waiver procedure, except that it specified that the test period would be based on cycles of the fresh food compressor if the freezer compressor does not cycle. DOE received no comments on this topic, other than AHAM's objection to the use of temperature cycles, which is discussed above. As a result, DOE will adopt the proposal for basing the first-part test period on the cycles of a primary compressor, and the proposed requirement for selecting the primary compressor.

Lastly, the July 2013 NOPR proposed to require that the first part of the test be a period of stable operation. AHAM strongly opposed this approach, arguing that it would be too restrictive, particularly for products with variable speed compressors. (AHAM, No. 30 at p. 15) AHAM indicated that "it does not matter whether the product reaches stability during that period or not—stability is not needed for the existing waiver approach." AHAM further indicated that DOE should not mandate the design of products by requiring stability. (*Id.*) The DOE test procedures—including those set forth in DOE waivers for multiple-compressor products[11]—have specific provisions to ensure that measurements are made during stable operation. DOE further notes that in the waiver test procedures, the test period for the first part of the test, "is calculated for a whole number of freezer compressor cycles . . ." and that testers are instructed to, "make this determination [i.e., that the unit under test has reached steady state for the first part of the test] for the fresh food compartment for the fresh food compressor cycles closest to the start and end of the test period." 78 FR 38700, 38701 (June 27, 2013). This language clearly implies that it is written for a system with cycling compressors, and that it requires stability to ensure that compartment temperatures do not rise or fall significantly during the test period. The DOE proposal, being based on the test procedure waivers, is consistent with the requirement for stability, but it also anticipates the potential for non-cycling compressors by providing a method to verify steady operation for the first part of the test for such products. The test procedure established by this final rule retains this approach. If there are products in existence that cannot properly be tested using this method, DOE believes that they would also not be properly tested using the waiver test procedure and, hence, DOE believes such products would require a different waiver with a different alternative test procedure.

Second Part of the Test

For the second part of the test, the July 2013 NOPR proposed a test period in which either the starting or stopping of the compressor can be used to determine both the beginning and end of the test period. For example, if a compressor start is used to determine the beginning of a test period, a later compressor start would be used to determine the end of the test period. Alternatively, a test period could begin and end when the compressor stops. Thus, a test period could extend from a compressor start to a compressor start or a compressor stop to a compressor stop, but not from a compressor start to a compressor stop or vice versa. In addition, the start and end of the test period must take place during stable operation before and after the target defrost cycle. DOE did not propose a 24-hour test period for the second part of the test because it concluded that increasing the period duration would not reduce the magnitude of the truncation error that might occur. 78 FR 41634–41636 (July 10, 2013).

The DOE proposal for multiple-compressor systems was consistent with Appendix A's requirement that the test period for the second part of the test for products with long-time or variable defrost must start and end during stable operation. Appendix A requires that the compartment temperatures for the compressor cycles prior to and after the second part of the test be within 0.5 °F of their temperature averages for the first part of the test (*See* Appendix A, section 4.2.1.1), as opposed to the 1.0 °F requirement of the Sub-Zero waiver and the AHAM proposal. DOE stated in the July 2013 NOPR that this same tolerance for ensuring that the test period does not include any events associated with the defrost cycle (such as precooling or recovery) should apply to multiple-compressor systems as well as single-compressor systems because the events before, during, and after the defrost cycles of both types of products have the same basic functions (removing frost from the evaporator) and same basic control sequence (optional precooling, heating, temperature recovery). However, DOE proposed a multiple-compressor system test procedure that would also require that the compressor cycles examined to confirm stable operation at the start and end of the second part of the test be the first and last compressor cycles (or temperature cycles) within the test period, consistent with the granted waivers. DOE believed that this approach would better ensure that the test period begins and ends during stable operation because the examination of compressor or temperature cycles would occur within the test period, and would not involve cycles that may fall outside the test period. In the special case where there are no cycling compressors, DOE proposed to require that the test period start and end when the compartment temperatures are within 0.5 °F of their averages for the first part of the test, which is also consistent with the Appendix A test procedure (*See* Appendix A, section 4.2.1.2).

Both AHAM and GE supported DOE's attempt to reduce the burden of the second part of the test for multiple-compressor products by not requiring that the test period last 24 hours.

[10] See, e.g., "Decision and Order Granting a Waiver to GE Appliances From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedures", Case No. RF–029, 78 FR 38699, 38700 (June 27, 2013).

[11] See, e.g., "Decision and Order Granting a Waiver to GE Appliances From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedures", Case No. RF–029, 78 FR 38699 (June 27, 2013). This waiver test procedure has specific requirements for stability and steady state, including, for example, "Steady State for EP1: The temperature average for the first and last compressor cycle of the test period must be within 1.0 degrees F (0.6 degrees C) of the test period temperature average for each compartment." *Id.* at pp. 38700–1.

(AHAM, No. 30 at p. 15; GE, No. 31 at p. 5) However, AHAM and GE indicated that DOE's dataset was not large enough to support the proposal as is. (*Id.*) AHAM also stated that DOE's proposal would cause an equal number of (if not more) concerns and complexity. (*Id.*) However, rather than detailing any specific concerns, AHAM recommended that DOE adopt the approach for the second part of the test found in the test procedure waivers for multiple-compressor products. AHAM offered to develop an improved procedure in the future.

Although the stakeholders did not clarify which aspect of DOE's proposal could not be supported by the limited dataset, DOE assumes that the key issue was the reduction of the test period for the second part of the test, eliminating the need for a duration of 24 hours. DOE notes that its conclusion that the 24-hour duration was unnecessary was based primarily on consideration of the energy use equations, and that its supporting data served as confirmation and demonstration of its initial conclusions that a 24-hour test period duration did not improve test accuracy. As discussed in the July 2013 NOPR, the term in the energy use equation that represents the contribution of defrost is not divided by the duration of the second part of the test, as is the term in the equation that represents the contribution of steady-state operation, which is divided by the duration of the first part of the test. This means that any truncation error introduced when measuring the energy usage for the second part of the test would not be reduced by selecting a longer test period, as would occur for the first part of the test. While DOE would not object to testers using continuous test periods as long as 24 hours for the second part of the test, DOE believes that combining multiple non-continuous running periods to accrue 24 hours of test period duration is inappropriate, because adding any additional running period has the potential to add additional truncation error to the calculation. Hence, DOE is adopting its proposed approach for the second part of the test for multiple-compressor products.

One-Part Test Simplification

In the July 2013 NOPR, DOE proposed a one-part test for multiple-compressor products for which (a) only one compressor system has automatic defrost and (b) that defrost is neither long-time defrost nor variable defrost. DOE noted in the July 2013 NOPR that the proposed test period would start at a point during a defrost period and end at the same point during the subsequent defrost period, which is the same approach taken by the existing test procedure for single-compressor products with automatic defrost that is neither long-time nor variable (*See* Appendix A, section 4.2). DOE proposed using a single test period to minimize the test burden for products with short-time automatic defrost for only one of the compressor systems.

GE commented that it is not aware of these types of products. (GE, No. 31 at p. 4) AHAM also questioned whether there are enough (or any) products that satisfy DOE's description to warrant a separate procedure or whether it would instead be sufficient to use the existing waiver approach. (AHAM, No. 30 at p. 13) DOE proposed this simplification to reduce test burden. However, the stakeholder comments indicate that there is no need for such a reduction in burden, due to the lack of applicable products, so DOE is not adopting this proposal. Instead, all products will have to be tested using the two-part test method as described in this final rule.

Test Simplifications for Tests With One or No Cycling Compressors

In the July 2013 NOPR, DOE proposed another test simplification for multiple-compressor products with either one or no cycling compressors. That proposal would allow use of the provisions in sections 4.1 and 4.2 of Appendix A for the first and second part of the test. Specifically, if only one of the compressors cycles, the test period for the first part of the test would be at least three hours long and comprise two or more complete cycles of the cycling compressor. Further, if none of the compressors cycle, the test period for the first part of the test would be three hours long. Both GE and AHAM indicated that DOE's proposal may not accurately account for the energy use of a model that has one cycling compressor and a second variable speed compressor. (GE, No. 31 at p. 4; AHAM, No. 30 at p. 14) DOE proposed this simplification to reduce test burden. However, commenters indicated that there are circumstances for which the approach would not work and suggested that burden reduction was unnecessary in this case. Hence, this final rule does not adopt the proposal to simplify the test procedure for multiple-compressor products with no more than one cycling compressor. Instead, these products will require the full first part of the test adopted in this final rule.

Energy Use Equations

DOE proposed an energy use equation for multiple-compressor systems similar to the equation found in Appendix A for products with single compressors and multiple defrost cycle types. For both of these product types, the energy use for each distinct defrost cycle is added separately using its corresponding CT value (*i.e.*, hours of compressor operation between defrosts) to adjust the measurement to represent the defrost cycle's average contribution to energy use per 24 hours (*See* Appendix A, section 5.2.1.5). DOE received no comment on this proposal and therefore adopts it in this final rule.

Effect on Measured Energy Use

DOE notes that the July 2013 NOPR proposed to replace the existing test procedure's dual compressor system test in Appendix A with a new test procedure that would address products using multiple-compressor systems. When modifying test procedures, DOE considers the extent to which the energy use or energy efficiency measurement may be altered under a proposed procedure. (42 U.S.C. 6293(e)(1)) As noted earlier, Appendix A will not be required for certifying compliance until the compliance date of the new refrigeration product energy conservation standards. 77 FR 3559 (Jan. 25, 2012). DOE is aware of very few products that have multiple-compressor systems and has received petitions for waiver from the existing test procedure from Sub-Zero, GE, LG, and Samsung for testing of dual compressor products, which DOE has granted. 77 FR 5784 (Feb. 6, 2012), 78 FR 38699 (Jun. 27, 2013), 78 FR 18327 (Mar. 26, 2013), 78 FR 35899 (Jun. 14, 2013). DOE's tentative view, at the time of the July 2013 NOPR, was that its proposed test procedure for multiple-compressor products would not significantly impact the manner in which such products would be tested using the test procedure of the waivers. DOE requested comment on the existence of other multiple-compressor products, how these products are tested (e.g., whether they use the existing dual compressor test procedure of Appendix A1), and whether the measurement of energy use would change using the proposed test procedure.

GE responded that there are differences in measured energy consumption based on the proposal, citing the differences in the measurement depending on whether the test periods are determined based on compressor cycles or temperature cycles. (GE, No. 31 at p. 5) As previously discussed, DOE is finalizing the test procedure without the option of using temperature cycles to determine test periods—only a compressor-cycle-based approach is being adopted, which

is the same one used in the test procedure waivers. Hence, DOE concludes that the measurement differences cited by GE would no longer be relevant.

Additionally, AHAM cited the potential one percent truncation error as evidence that the proposed test procedure could impact measured energy use and indicated that DOE should analyze the data that it collected to determine if the measurement could change when using the proposed test procedure. (AHAM, No. 30 at p. 16) DOE acknowledges there is a potential for truncation error when using the waiver test procedure (which is a question of overall accuracy). DOE believes that the measurement resulting from the procedure adopted in this final rule would result in a more accurate and representative measurement of the product's energy use rather than an actual change in measured energy use.

Sub-Zero responded that the waiver test procedure is accurate, repeatable, and has been verified through use at independent laboratories and in the "industry verification program." [12] It added that the proposed test procedure would be more complicated, time-consuming, difficult to conduct and potentially less accurate and repeatable than the waiver test procedure. Sub-Zero also pointed to the specific areas of concern contained in the AHAM comments. (Sub Zero, No. 32 at pp. 1–2) In this final rule, DOE has modified the procedure by addressing many of the key concerns raised in the AHAM comments. As discussed above, the remaining key difference between the procedure finalized in this final rule and the waiver test procedure pertains to the waiver test procedure's use of non-continuous running periods to accrue a full 24 hours of testing time for both parts of the test. As discussed above, DOE believes that allowing non-continuous running periods subjects the test procedure to risk of greater error, based on DOE's testing and analysis. DOE believes that the potential error is likely to be greater than the one percent that AHAM separately suggested may not be acceptable. Were DOE to accept AHAM's recommended approach, the risk of increasing the truncation error would be even larger than under the approach DOE is adopting today. DOE notes that it received no details of any work by industry, to which Sub-Zero alluded in its comments, to validate the waiver test procedure. Consequently, DOE's views regarding the potential impacts of the procedure are based on a review of its own data and the fundamental fact that each additional running period introduced into the energy use equation can compound the truncation error with the addition of another truncation event. Hence, DOE has not adopted the waiver test procedures' allowance of the use of non-continuous running periods. Instead, DOE will adopt the approach proposed in the July 2013 NOPR, which requires a single segment of time to comprise the test period. In this way, the risk of truncation error will be substantially reduced, compared to the current test procedure waiver approach that some manufacturers have been permitted to use.

DOE received no comments indicating the existence of other multiple-compressor products other than those identified in waivers and no comments indicating that any products are tested using the existing dual compressor test procedure.

Elimination of Multiple-Compressor Test Procedure Waivers

DOE notes that, consistent with its regulations, the Sub-Zero, GE, LG, and Samsung dual compressor waivers will terminate once parties are required to use the multiple-compressor test procedures of Appendices A and B to demonstrate compliance with DOE regulations (*i.e.*, on September 15, 2014). (*See* 10 CFR 430.27(m))

Multiple-Compressor Products With Manual Defrost

These new procedures for multiple-compressor products apply only to multiple-compressor products with automatic defrost. DOE received no comment revealing the existence of multiple-compressor products with manual defrost and has not made changes in the test procedure to account for such products.

2. Triangulation

The July 2013 NOPR proposed incorporating a modified version of the so-called "triangulation" interpolation approach described in Australian/New Zealand Standard 4474.1–2007 [13] (AS/NZ 4474.1–2007) as an option to calculate energy use. DOE's test procedures generally require conducting the energy test for two different settings of the temperature control. See, e.g., 10 CFR Part 430, Subpart B, Appendix A, section 3.2.1. The energy use is calculated as a weighted average of the measurements of the two tests, depending on the compartment temperatures measured during the tests, to represent the energy use that would occur if the compartment temperature were exactly equal to its standardized temperature. See, e.g., Appendix A, section 6.2.1.2. As described in the NOPR, for products with two compartments, this calculation often represents the operation of a product in which one of the compartments is cooler than its standardized temperature. 78 FR 41636–41637 (July 10, 2013). The triangulation approach resolves this issue by using a weighted average of the energy use measured from three tests, thus allowing calculation of the energy use that would occur when both compartment temperatures exactly equal their standardized temperatures. The July 2013 NOPR explained in detail why the triangular interpolation of the measurements for three temperature settings results in a more accurate measurement of energy when compared to the linear interpolation using two temperature settings. (*Id.* at 41637).

The NOPR proposed to incorporate by reference parts of Appendix M of AS/NZS 4474.1–2007 as an optional interpolation method. A new section 3.3 of the test procedure would reference subsections M3.a through M3.c and Figure M1 of appendix M of AS/NZS 4474.1–2007 to specify the requirements for the three-setting test procedure as an alternative to using the requirements of section 3.2 of Appendix A. The procedure would clarify that the target temperatures t_{xA} and t_{xB} discussed in the Australia/New Zealand procedure would be the standardized temperatures as defined in section 3.2 of the DOE test procedure. However, DOE proposed to require that the first two of the three tests comply with the requirements for the two-test method contained in Appendix A, section 3.2.1. DOE included this requirement because it would also allow for use of the current energy calculations as well as the triangulation energy calculations. 78 FR 41639 (July 10, 2013).

AHAM submitted comments supporting the adoption of a triangulation approach. (AHAM, No. 30 at p. 17) However, AHAM suggested that DOE not require that the first two settings of the triangulation test adhere to the provisions in Appendix A for a two-setting test because AS/NZS 4474.1–2007 allows test facilities to

[12] The Sub-Zero comment did not clarify, but DOE believes that the "industry verification program" referred to in Sub-Zero's comments may be the verification program managed by AHAM—see *http://www.aham.org/industry/ht/d/Items/catid/49796/pid/1220/cids/389,425,49796.*

[13] "Australian/New Zealand Standard, Performance of Household Electrical Appliances—Refrigerating Appliances, Part 1: Energy Consumption and Performance", AS/NZS 4474.1:2007, Appendix M, available for purchase at *http://infostore.saiglobal.com/store/results2.aspx?searchType=simple&publisher=all&keyword=AS/NZS%204474.*

choose the settings of all tests for more accurate results. (*Id.*) As a result, AHAM asked DOE to reconsider this aspect of its proposal in order to harmonize with AS/NZS 4474.1–2007 as well as with the refrigerator test standard currently under development by the International Electrotechnical Commission (IEC), as represented by its Committee Draft for Vote (CDV) of Part 1 of IEC 62552.2 *Household refrigerating appliances—Characteristics and test methods.* (*Id.*)

DOE agrees with AHAM that allowing greater flexibility in the selection of temperature settings may provide more accurate results. As described in AS/NZS 4474.1–2007, when the three sets of measured compartment temperatures (freezer compartment temperature paired with fresh food compartment temperature) are plotted on a graph of freezer temperature versus fresh food compartment temperature, the triangle formed by the points must enclose the point representing the pair of standardized temperatures (*i.e.,* 0 °F freezer compartment temperature and 39 °F fresh food compartment temperature). Ensuring that the three tests meet this requirement may be much more difficult if the first two tests must be conducted exactly as dictated by the DOE test procedure. Therefore, DOE is permitting any three sets of temperature control settings to be selected for the optional triangulation approach, provided that the temperature settings for each individual compartment all represent median, coldest, or warmest settings. DOE is adopting this approach based on its belief that it is important to provide a valid measurement of energy use at the standardized compartment temperatures, and that using the settings prescribed for the current two-test approach is not essential to achieving this objective because the triangulation interpolation method is designed to work with any three settings with temperatures that surround the target standardized temperatures (*i.e.,* for which the plotted triangle encloses the standardized temperature point, as described above).

The July 2013 NOPR proposed a new section 6.2.2.3 detailing the calculation of energy use under the proposed triangulation approach. This proposed section would require using the calculations described in section M4.a of AS/NZS 4474.1–2007 to determine the energy consumption of the tested unit but excluding the energy use contribution of icemaking. The fixed value of energy use associated with icemaking, defined in section 6.2.2.1, would be added to this result for products with automatic icemakers. DOE received no comment on this proposal. Accordingly, DOE is adopting its proposed approach.

Finally, during the 2013 public meeting, GE commented that DOE should consider incorporation of the single test to measure energy consumption found in Appendix L of AS/NZS 4474.1–2007. (This test requires that the compartment temperatures measured during the test are both no higher than their standardized temperatures.) (GE, NOPR Public Meeting Transcript, No. 23 at p. 99) Using a single test would reduce test burden, assuming the measured compartment temperatures are lower than their standardized temperatures for the first selected test setting and additional tests are not needed. However, in this final rule, DOE has decided not to incorporate a single setting test because stakeholders have not been provided adequate time to review the details of the suggested procedure. DOE may consider this procedure in the future.

Certification

DOE proposed to amend section 429.14(b) to require manufacturers to identify which interpolation method they used to rate and certify a particular basic model (i.e., triangulation or a two-setting test). In the NOPR, DOE noted that more than one unit is tested for each rating (*See,* for example, 10 CFR 429.11(b), which indicates a sample size minimum of two units). Therefore, DOE proposed to require that all units of a given model that are tested for certification purposes be tested using the same test method and that the certification report indicate whether the triangulation method was used.

AHAM suggested that DOE not require manufacturers to report which method was used for certification testing (*i.e.,* whether the two-test method or the triangulation method was used) because this would add to manufacturer reporting burden, and because DOE can request to see test reports of certified models if it wishes to confirm whether products were tested using triangulation. (AHAM, No. 30 at p. 17) AHAM also indicated that test facilities should be permitted to use different methods for each unit within a model's sample to prevent unnecessary added test burden. (*Id.*) For example, individual units may have refrigeration and control systems tuned so that both compartments have temperatures equal to their standardized temperatures at equivalent temperature control settings. For such units, the calculated energy use (e.g., per Appendix A, section 6.2.2.2) would be the same when using the freezer compartment interpolation and the fresh food interpolation, and use of a third test and a triangular interpolation would not change the result.

Viewed from within the context of compliance with the applicable energy conservation standard, an individual unit may satisfy the applicable standard with sufficient margin using the two-test method while other units within the same model sample may require the triangulation method to satisfy the relevant energy standard with sufficient margin. Because triangulation might not be required for testing of all units in a sample to show that the model meets the applicable energy conservation standard, and to limit the required test burden, DOE will not adopt the proposed requirement that triangulation must be used for all units tested to certify compliance for a given model if the test for one of the units uses the method. Further, because measurements using the two-test method would generally be more conservative (indicating higher energy use), but be only slightly different than measurements made using triangulation, DOE considers both methods to be valid. Hence, in order to further reduce the burden associated with certification, DOE will not require certification reports to indicate whether triangulation was used for testing.

Regarding testing options generally, DOE notes that because the two-test method generally yields results that are more conservative than the triangulation test (*i.e.,* higher energy use), DOE proposed to permit manufacturers to continue using the two-part test at their discretion. By permitting manufacturers to continue using the simpler two-part test, DOE intended to limit the overall burdens that are placed on the industry. However, given that tests conducted using the triangulation approach may potentially, for certain basic models, yield more representative results, DOE proposed to use this particular method when conducting assessment testing, pursuant to 10 CFR 429.104, and enforcement testing, pursuant to 10 CFR 429.110, if either (a) the manufacturer indicates that the triangulation method was used for rating the model, or (b) certain conditions are observed during the first two tests of a given unit of a basic model that suggest that a third test might yield a more representative measurement than the two-test method. Specifically, if the calculated energy use using Appendix A, section 6.2.2.2 (one measurement based on use of the fresh food compartment temperature and the other based on the freezer compartment temperature) differs by more than five

percent of the greater of the two results for any tested unit of the basic model, DOE proposed that it would use the triangulation method for any assessment or enforcement testing for all units of that basic model. This approach may, in certain circumstances, require retesting of a unit previously tested if, for example, condition (b) above did not apply for the test conducted for a first unit of a tested model but did apply for later tests. AHAM suggested that DOE use the triangulation approach whenever testing units within its verification programs to guarantee accuracy. (AHAM, No. 30 at p. 17) DOE is specifying in a new section 429.134 that DOE will use the triangulation test prior to making a finding of noncompliance with respect to a particular basic model for that particular sample of tested units because the two-test method in some cases will result in a more conservative measure of energy use. In other circumstances, however, to limit unnecessary testing, DOE will not necessarily use the triangulation method.

3. Anti-Circumvention Language

Revisions Addressing Past Stakeholder Comments

DOE proposed to revise the anti-circumvention language in sections 10 CFR 430.23(a)(10)(ii) and 10 CFR 430.23(b)(7)(ii) to better reflect the wording found in the AHAM's HRF–1 2008 procedure, as had been recommended in comments by AHAM and Whirlpool that were provided during the December 2010 interim final rule comment period. (*See* "Test Procedure for Residential Refrigerators, Refrigerator Freezers, and Freezers," Docket No. EERE–2009–BT–TP–0003, No. 16 at p. 4, No. 12 at p. 2) The current DOE anti-circumvention language was modeled after section 1.2 of HRF–1–2008 and parts of the DOE language are nearly identical to the HRF–1–2008 language. DOE proposed to bring the DOE language into even closer alignment with HRF–1–2008 in the July 2013 NOPR because such changes would not weaken the requirements and would help achieve better consistency with the nearly identical industry standard, which would generally make testing more consistent. DOE also proposed to move the four examples (currently section 10 CFR 430.23(a)(10)(ii)A–D) describing components operating in a manner inconsistent with operation under typical room conditions to follow the paragraph describing operational behavior that DOE identifies as constituting anti-circumvention. 10 CFR 430.23(a)(10)(i)

In response to the July 2013 NOPR, AHAM and Whirlpool supported the proposed revisions to the anti-circumvention sections. (AHAM, No. 30 at p. 17; Whirlpool, No. 27 at p. 2) However, BSH commented that DOE should refer to the draft IEC test procedure [14] for guidance on how to improve DOE's anti-circumvention sections. (BSH, No. 21 at p. 1) DOE notes that changes to the anti-circumvention sections were proposed in response to earlier industry feedback and comment, which did not mention the IEC draft test procedure language. DOE reviewed the IEC draft test procedure, which has two key provisions that are not in the DOE test procedure—(a) the IEC draft test procedure provides detailed guidance on how to detect circumvention once suspected, and (b) the IEC draft test procedure identifies what is not considered to be circumvention. The IEC draft describes these provisions in detail. While DOE believes that the inclusion of these provisions may have merit, the agency wishes to ensure that the public receives a sufficient opportunity to review these provisions. Therefore, DOE is not adopting BSH's suggestion at this time but may consider proposing these provisions in the future. DOE received no other comments on its proposed revisions to the anti-circumvention language and is adopting its proposed changes for these sections.

Components That Operate Differently During Testing

The July 2013 NOPR discussed inquiries from Whirlpool and Samsung about when to apply for a test procedure waiver for products that operate differently during testing as compared to typical field operation. This scenario is addressed in a clause of the existing anti-circumvention language of the DOE test procedure that DOE did not propose to modify. See, e.g., 10 CFR 430.23(a)(10) (indicating that a manufacturer must obtain a waiver if (i) a product contains energy consuming components that operate differently during the prescribed testing than they would during representative average consumer use, and (ii) applying the prescribed test to the product would evaluate it in a manner that is unrepresentative of its true energy consumption). DOE also issued guidance on this matter on May 28, 2013. That guidance provides a framework for assessing the potential need for a waiver within the context of the existing anti-circumvention provisions.[15] As a result, the July 2013 NOPR did not propose a specific amendment to the provisions of 430.23(a)(10) (and 430.23(b)(7) for freezers) to further address the concerns raised by the Whirlpool and Samsung inquiries. The NOPR did, however, request comment on the need for a potential test procedure revision.

AHAM agreed with DOE's approach—i.e., not to modify the current anti-circumvention language to accommodate products that operate differently during testing. AHAM indicated that the May 2013 guidance document sufficiently addresses this issue. This final rule makes no changes to the current anti-circumvention language.

4. Incomplete Cycling

In the July 2013 NOPR, DOE proposed changing the incomplete cycling compressor test procedure to improve its accuracy and ease test burden. Specifically, DOE proposed to eliminate the 24-hour test period requirement for products exhibiting compressor cycles that exceed 12 hours in length, and instead require that the test period be comprised of a single compressor cycle. The July 2013 NOPR discusses the advantages of the proposal compared to the current requirement in section 4.1 of Appendices A and B. 78 FR 41640 41641 (July 10, 2013).

During the NOPR public meeting, GE mentioned that based on its experience, test facilities in the U.S. and abroad base test periods on a whole number of compressor cycles rather than using the 24 hour test period that is required in the DOE procedure for products with incomplete cycling. (GE, Public Meeting Transcript, No. 23 at p. 105; GE, No. 31 at p. 7) In DOE's view, using a whole number of compressor cycles yields an accurate measurement of the energy use of a product with incomplete cycling. GE supported the DOE proposal and agreed with DOE that test periods should be based on whole numbers of compressor cycles rather than be set at 24 hours for incomplete cycling products. (*Id.*) AHAM also agreed with the DOE proposal. However, AHAM recommended that DOE remove the term "incomplete cycling" from the test procedures and instead modify section 4.1 of Appendices A and B to simply state, "If fewer than two compressor

[14] Committee Draft for Vote (CDV) of Part 1 of IEC 62552.2 Household refrigerating appliances—Characteristics and test methods.

[15] This guidance is posted in DOE's online Guidance and FAQ database, and is available for viewing at: *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1.*

cycles occur during a 24-hour period, then a single complete compressor cycle may be used." (AHAM, No. 30 at p. 18) DOE notes that section 4.1 is the only place in either Appendix A or B that uses the term incomplete cycling. DOE agrees that the term is not needed and is adopting the change suggested by AHAM.

Additionally, AHAM suggested that DOE modify the test procedures to allow the data used to establish steady state conditions (e.g., as described in Appendix A, section 2.9) to be used when performing the first part of the two-part test for products with long-time or variable defrost. (AHAM, No. 30 at p. 18) AHAM argued that its approach would be better than requiring separate periods for verifying stabilization and the test period because of the shortened test time. (*Id.*) AHAM indicated that requiring a separate period to comprise the first part of the test made sense when data were collected manually because stability needed to be determined before collecting test data. However, current electronic data acquisition systems can collect data during the stability period without added burden. Finally, AHAM recommended that DOE adopt AHAM's proposal for all products and not just incomplete cycling products. (*Id.*) GE made essentially the same comment during the public meeting. (GE, Public Meeting Transcript, No. 23 at pp. 105 6) DOE notes that adopting these changes at this time would not allow adequate time for stakeholder input, but DOE may consider this approach in a future rulemaking.

5. Correction of Temperature Measurement Period

In the July 2013 NOPR, DOE proposed to address an inconsistency in the existing test procedure associated with temperature measurements for short time defrost products (*i.e.*, products whose defrost is neither long time nor variable). Specifically, DOE proposed to require that the compartment temperatures used in energy use calculations for these products be the averages of the measured temperatures taken in a compartment during a stable period of compressor operation containing no defrost cycle or events associated with a defrost cycle, such as precooling or recovery, that includes at least two complete compressor or temperature cycles (if the compressor cycles on and off or the temperature cycles up and down) and is at least three hours in duration—essentially the same test period specified in section 4.1 of the test procedure for products with manual defrost, except that for these short-time defrost products this test period would be used for temperature measurement only, whereas it is used for both energy and temperature measurement for manual defrost products. DOE received no comments regarding this proposal. However, as discussed in section III.C.1, stakeholders objected to using temperature cycles to define test periods. Hence, DOE is adopting its proposed amendments to section 5.1.2 of Appendices A and B for correcting the test procedure requirements for measuring compartment temperatures, except for the option to select test periods based on temperature cycles.

6. Mechanical Temperature Controls

Recently, third-party test facilities have asked DOE to clarify how to determine the proper settings for mechanical temperature controls. Specifically, they inquired whether, when setting mechanical controls to the warmest or coldest setting, the control should be adjusted to the position at the last number or symbol on the control, or whether it should be positioned to the most extreme physical positions of the control. In response to these inquiries, DOE proposed requiring that mechanical controls be set to the highest or lowest number or symbol indicated on the control. DOE proposed this method instead of the alternative because of the possibility of unintentionally turning off the unit when moving the control to the extreme physical position for the warmest setting.

GE noted that different test facilities follow different methods for determining the warmest and coldest settings. (GE, No. 31 at p. 7) GE and Whirlpool supported DOE's proposal because it would ensure that all test setups are the same, and because the proposal is consistent with the current Canadian Standards Association (CSA) test standard C300–08, "Energy Performance and Capacity of Household Refrigerators, Refrigerator-Freezers, Freezers, and Wine Chillers," ("CSA C300–08"). Section 5.1.7.1(b) of CSA C300–08 requires that control settings must be at the "marked warmest or coldest settings." (GE, No. 31 at p.7; Whirlpool, No. 27 at p. 3))

FSI supported DOE's intent to limit the interpretive nature of the test procedure, but stated that some products use temperature controls with "extreme cold" positions that bypass the thermostat and are intended only for short-duration, rapid cool-down of newly inserted food. It also noted that the behavior of some compact products may be erratic at extreme temperature control settings. (FSI, No. 20 at p. 7) (FSI did not provide details of this erratic nature or why this behavior would occur specifically in compact products.) FSI recommended that the procedure use control settings for warm and cold operation that are one position higher and lower than the median position. (*Id.*) DOE notes that this method has not been previously raised or considered, and FSI provided no data to support its suggested approach. As a result, in the absence of any supporting data and with no opportunity for public comment on this approach, DOE is declining to include FSI's additional recommendations and is adopting into section 3.2.1 of Appendices A and B the proposed amendment for mechanical controls. DOE notes, however, that any party that believes that testing a given model in accordance with the DOE test procedure will yield materially inaccurate comparative data must apply for a test procedure waiver.

7. Ambient Temperature Gradient

Location of Ambient Temperature Sensors

Appendices A and B reference HRF–1–2008 for ambient temperature measurement requirements. However, the version of HRF–1–2008 in use at the time DOE was preparing the July 2013 NOPR did not specify the location of sensors to measure ambient temperature. As a result, DOE proposed to add sensor location requirements in a new section 2.1.1. The proposal specified that the ambient temperature be recorded at points located 3 feet above the floor and 10 inches from the center of the two sides of the unit, the same locations that have been used for refrigerator testing for decades. See, e.g., HRF–1–1979, sec. 7.4.3.1, incorporated by reference in 10 CFR part 430, subpart B, Appendix A1

FSI opposed DOE's proposal to measure ambient temperature on the sides of the units. (FSI, No. 20 at pp. 7 8) However, based on FSI's additional comments, DOE believes that FSI objected to DOE's proposal to require additional measurement of ambient temperature at heights of 2 inches and 7 feet (or one foot above the top of the unit, whichever is higher) rather than its proposal to require the two ambient temperature measurements at the locations used in the current test procedure. DOE believes that FSI's concern is about the proposed requirement for four additional ambient temperature sensors. This issue is associated with maintenance of the ambient temperature gradient rather than specifically the measurement of

ambient temperature, which is discussed below.

AHAM, GE, and Whirlpool supported the proposed sensor locations. (AHAM, No. 30 at p. 19; GE, No. 31 at p. 7; Whirlpool, No. 27 at p. 4) AHAM stated that it issued an errata document in April 2013 for HRF–1–2008 to correct its inadvertent omission of specified temperature sensor locations. Given the publication of the errata, AHAM indicated that the new section of Appendices A and B proposed in the NOPR to address this issue may not be required (AHAM, No. 30 at p. 19), likely basing this statement on the assumption that, once the errata were published, they would be considered to be incorporated by reference in DOE's test procedures with the surrounding sections of HRF–1–2008. DOE notes that its test procedures would have to be amended to clarify that the new section of HRF–1–2008 is incorporated by reference; when DOE incorporates a standard, the standard is only incorporated as it exists at the time of incorporation. As such, DOE had to specifically incorporate the November 17, 2009 Errata to make them a part of the DOE test procedure.[16] However, some of the proposals for the new ambient temperature section in Appendices A and B that DOE is adopting, discussed below, are not the same as the language in HRF–1–2008. Hence, DOE has decided to adopt the proposal to insert the ambient temperature requirements directly in section 2.1.1 of Appendices A and B. DOE notes that its requirements for ambient temperature measurement are consistent with the requirements in HRF–1–2008, including the recent errata, but that the adopted text more clearly describes the requirements.

Relocation and Shielding

In the July 2013 NOPR, DOE noted that the requirements in Appendices A and B suggest that relocating ambient temperature sensors is appropriate when necessary to avoid the impact of the warming effect of the condensing unit. DOE does not believe that this relocation is appropriate for the reasons outlined in the NOPR. See 78 FR 41643 (July 10, 2013). Hence, DOE proposed to eliminate the temperature sensor relocation option. This option is suggested by section 5.3.1 of HRF–1–2008, which is incorporated by reference in Appendices A and B: "Temperature measuring devices shall be located or shielded so that indicated temperatures are not affected by the operation of the condensing unit or adjacent units." DOE proposed language to clarify that shielding is allowed but not relocation of the sensor. DOE proposed to include the modified language in Appendices A and B in the revised section 2.1 addressing ambient temperature requirements. DOE received no stakeholder comments opposed to the modified language. Hence, DOE adopts this proposal in this final rule.

Condenser Temperature Sensor

FSI commented that heat can build up behind refrigerators with rear wall condensers, especially if they are placed near a wall. FSI recommended that DOE require placing a temperature sensor behind any unit with a rear mounted condenser. (FSI, No. 20 at p. 7) FSI provided no details on the exact placement of such a sensor, nor recommendations regarding the purpose or use of the measurement. DOE agrees that heat can build up behind any refrigeration product when placed close to a rear wall, which is the positioning required in the test procedure. The test procedure requires units to be placed with minimal clearance to a rear wall because such placement is very common in consumers' homes—and the test procedure attempts to reproduce any impact that such field placement can have on a refrigerator's performance. See 75 FR 78820–78821. Because FSI provided no supporting details regarding its recommendation and because DOE has no other basis on which to require accounting for heat buildup behind the cabinet, DOE is declining to adopt it.

Maintaining the Ambient Temperature Gradient During Testing

Appendices A and B currently require that the ambient temperature gradient be "maintained during the test." Further, section 5.3.1 of HRF–1–2008, incorporated by reference in section 2.2 of Appendices A and B, indicates that, "Unless the area is obstructed by shields or baffles, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height 1 foot (30.5 cm) above the unit under test." DOE explained that this language from HRF–1–2008 is vague as to whether the ambient temperature gradients must be maintained if there are shields or baffles present. DOE proposed to eliminate this ambiguity by (1) removing the reference to HRF–1–2008 section 5.3.1 from section 2.2 of Appendices A and B and (2) revising section 2.1 of Appendices A and B to explain that parties must shield temperature measuring devices when measuring ambient temperature, if necessary to prevent the indicated temperatures from being affected by the condensing unit or adjacent units. DOE received no stakeholder opposition on this proposal and is adopting this proposal.

Regarding the maintenance of ambient temperature gradients, DOE recognized that at least some test facilities have faced difficulties with this requirement, particularly in light of the current lack of specificity in Appendices A and B on how to demonstrate that the temperature gradient is being maintained during testing. DOE proposed to require the use of temperature sensors on both sides of the test sample at 2 inches above the floor, 36 inches above the floor, and either 7 feet above the floor or one foot above the top of the cabinet, whichever is higher. The 36 inch sensors have always been required, as discussed above, and the proposal added four additional required sensors. However, as discussed in the NOPR, most test laboratories already employ the four additional ambient temperature sensors. 78 FR 41644 (July 10, 2013). In addition, DOE proposed that the gradient would be maintained during testing at locations between the two pairs of vertically adjacent sensors on each side (*i.e.*, between the 2-inch and 36-inch temperature sensors and also between the 36-inch and highest positioned sensors).

FSI objected to the proposed additional temperature sensors to measure the temperature gradient, indicating that while this approach might be suitable for large products with condensers mounted underneath the cabinets, most compact refrigerators have condensers mounted on their rear walls. (FSI, No. 20 at p. 7) The comment did not clarify why maintaining the ambient temperature gradient would not be necessary for accurately measuring the energy use of compact refrigerators. However, FSI also recommended that DOE investigate the frequency at which tests are likely to be invalidated under the proposed requirements due to occurrence of excessive temperature gradients. (*Id.* at p. 8) In DOE's work with test laboratories testing refrigerators, all of these test laboratories have used the four additional temperature sensors to document maintenance of the temperature gradient. While most of the laboratories have had no trouble maintaining the gradient, in some cases there have been issues with maintaining it. However, in such situations, both the laboratory and DOE have agreed that the inability to show that the gradient has been maintained indicates that the test does not follow the *existing* test procedure,

[16] See 10 CFR 430.3(h)(6).

not simply the procedure as proposed in the July 2013 NOPR. Therefore, DOE believes that the 2013 NOPR proposal for ambient temperature gradients would not increase the frequency at which tests would be invalidated due to excessive temperature gradients. The requirement to maintain the gradient has been part of the procedure since development of HRF–1–1979 and the proposal to document maintenance of the gradient is simply a clarification that DOE is at this time adding to the test procedure instructions.

AHAM requested that DOE revise the language of the proposal to better accommodate compact products and products that are less than six feet tall by eliminating the clause ''7 feet (2.2 m) or to a height'' from the proposal in section 2.1.2. (AHAM, No. 30 at p. 19) For a product less than six feet tall, the clause in question would require ambient temperature sensors at locations more than 1 foot above the top of the unit. DOE agrees that maintaining the temperature gradient at heights greater than 1 foot above the unit is not necessary, since the temperature gradient at a distance more than 1 foot from the unit is not likely to affect its performance. Therefore, DOE is adopting AHAM's suggested modification to the DOE proposal in section 2.1.2 of Appendices A and B because the ambient temperature gradient in the space more than one foot above the unit should not affect test results.

Finally, DOE proposed that the temperature measured by ambient temperature sensors be recorded in the test data underlying certifications in accordance with 10 CFR 429.71. DOE received no comment specific to this proposal and therefore adopts this proposal in section 2.1.2 of Appendices A and B.

Revising Ambient Temperature Requirements for Appendices A and B

As mentioned previously, the ambient temperature requirements in Appendices A and B as finalized in the January 2012 Final Rule incorporate by reference certain sections of HRF–1–2008. Because DOE proposed in the July 2013 NOPR to modify some of these requirements, it also proposed to adopt directly into the appendices a modified version of the ambient temperature requirements of HRF–1–2008. This would create new sections 2.1.1 through 2.1.4 for both Appendices A and B and would remove the incorporation by reference for HRF–1–2008, section 5.3.1. DOE received no comments opposed to this amendment and therefore adopts it in this final rule.

8. Elimination of Reporting of Product Height

In the July 2013 NOPR, DOE proposed to eliminate the requirement for manufacturers to report product height in certification reports as currently specified in 10 CFR 429.14(b)(2). DOE made this proposal because the September 2011 Energy Conservation Standard final rule eliminated the 36 inch height restriction in the definition for compact products, effectively expanding the ''compact'' definition to include products with a total volume less than 7.75 cubic feet and height exceeding 36 inches. FSI, GE, Whirlpool, and AHAM all supported the DOE proposal. (FSI, No. 20 at p. 8; GE, No. 31 at p. 7; Whirlpool, No. 27 at p. 4; AHAM, No. 30 at p. 21) No commenter objected to this approach. As a result, DOE is adopting its proposal.

9. Definitions Associated With Defrost Cycles

In its proposal, DOE noted that the January 2012 Final Rule amendments modified the test periods for products with long time or variable defrost (*See,* e.g., Appendix A, section 4.2.1). 77 FR 3563–3568 (Jan. 25, 2012). That rule provided that the first part of the test would be a stable period of compressor operation that includes no portions of the defrost cycle, such as precooling or recovery. See 77 FR 3563 (Jan. 25, 2012) for a detailed explanation of the concepts of ''precooling'' and ''temperature recovery.'' However, DOE did not define the terms ''precooling'' and ''temperature recovery,'' nor did it define what comprises a ''stable period of compressor operation.'' As a result, DOE proposed definitions for each of these terms in the July 2013 NOPR to clarify the requirements of the test procedure.

Stable Operation Definition

The July 2013 NOPR proposed to establish a definition for the term ''stable operation,'' for which the rate of change of the compartment temperature would be no more than 0.042 °F per hour. This is consistent with the existing test procedure requirement for determining steady-state operation (*See,* for example, Appendix A, section 2.9). For products with compressor cycles, or temperature cycles resulting from the cycling of a system component such as a damper or fan, the average compartment temperatures measured for two separate cycles within a selected period would be compared to determine stability. For products with no temperature cycling, any two points within a period would be compared to determine stability.

AHAM's comment supported the DOE proposal to establish a definition for stable operation. AHAM did, however, suggest that DOE change ''rate of change'' to ''difference in compartment temperatures,'' explaining that this description ''more accurately represents the fact that the test compares the temperature difference between two two hour periods based on the time between those periods.'' (AHAM, No. 30 at p. 21) DOE agrees that the rate of change is calculated as the difference between two temperature values (measured either at two different times or as the average temperatures during two different time periods representing cycles) divided by the elapsed time between those times (or time periods). This is described explicitly in sections (A) and (B) of the proposed definition. In order to avoid potential misinterpretation that the words ''rate of change'' might mean something different, DOE will modify the definition to call this ''average rate of change''.

AHAM also suggested that DOE include a diagram to assist with the definition of stable operation. (AHAM, No. 30 at p. 21) DOE notes that the figure provided in AHAM's written comments suggests a more restrictive approach in defining stable operation than DOE had intended. AHAM's figure indicates that the two periods that are compared to quantify the temperature rate of change are at least two hours long and that they are separated by at least 3 hours. The definition of stable operation neither has nor was intended to have this restriction, which is part of the current requirement for verifying that steady-state conditions exist (*see* Appendix A, section 2.9). The section 2.9 requirements are used at the start of a test to verify that the compartment temperatures of a product are no longer rapidly decreasing. In contrast, the stable operation definition, while based on the same 0.042 °F per hour (equal to 1 °F per 24 hours), is used to identify periods when the compartment temperatures are not changing or are changing in a repetitive cyclic pattern with minimal upward or downward drift of the per-cycle average temperature. DOE believes that the definition, with the revision regarding temperature difference as suggested by AHAM, is sufficiently clear.

DOE also notes that the definition allows for the evaluation of stable operation for products that do not have cycling compressors but have cycling compartment temperatures. The cycles evaluated to determine existence of

stable operation may be temperature cycles. For this reason, DOE retains its proposed definition of temperature cycles in the test procedures.

DOE also proposed to define "stable period of compressor operation" as a period of stable operation for a product with a compressor. 78 FR 41645 (July 10, 2013). AHAM commented that this term was not needed, since the concept is sufficiently clear without having to explicitly define the term, once "stable operation" has been defined. DOE acknowledges that the added definition for "stable period of compressor operation" is not necessary and has not added it to appendices A or B in this final rule.

Precooling & Recovery Definitions

AHAM also objected to DOE's proposed definitions for precooling and recovery, indicating that Figure 1, which is in Appendices A and B, adequately defines these terms. (AHAM, No. 30 at p. 20) In addition, AHAM claimed that the DOE proposal conflicts with the graphical representation in Figure 1 of Appendices A and B. AHAM indicated that if definitions are established, they should agree with the illustration of "T2" in the figure, the test period for the second part of the test. AHAM further suggested that Figure 1 does not define the end of the precool or the start of recovery and that definitions for the terms also should not define these times. (*Id.*)

DOE notes that Figure 1 provides an example illustrating the test period for the second part of the test for a product with a cycling compressor. The figure includes examples of precool and recovery cycles, but it does not illustrate precooling and/or recovery for all situations. Furthermore, the intent of the second part of the test is to capture all product operation that either (1) significantly lowers the compartment temperature before defrost initiation or (2) restores compartment temperatures afterwards. This intent is clear from at least two provisions in the current regulatory text. First, the last sentence in section 4.2.1 of Appendix A as finalized by the January 2012 Final Rule states that "[t]he second part is designed to capture the energy consumed during all of the events occurring with the defrost control sequence that are outside of stable operation." This section clearly identifies operation that is associated with defrost activity and is not consistent with stable operation, *i.e.*, activity that the second part of test is designed to capture. Second, section 4.2.1.1 notes that a "precooling" cycle, which is an extended compressor cycle that lowers the temperature(s) of one or both compartments prior to energizing the defrost heater, must be included in the second part of the test.

DOE believes that the proposed definitions for precooling and recovery are consistent with the language in section 4.2.1 describing the second part of the test. AHAM provided an example of a product that cycles from +1 °F to −1 °F and then changes its cycling from +2 °F to −2 °F with equivalent temperature averages. (AHAM, No. 30 at p. 20) AHAM indicated that the second cycle would be considered precooling according to the proposed definition. (*Id.*) DOE agrees that in AHAM's example, the second cycle would be considered precooling because it would have had to include an "extended compressor cycle that lowers the temperature(s) of one or both compartments prior to energizing the defrost heater." In order to cool the compartment the four degrees from +2 °F to −2 °F, the compressor would likely have had to operate twice as long as it would have taken to cool the compartment the two degrees from +1 °F to −1 °F. This would clearly be an extended compressor cycle and would be considered part of the second part of the test under the test procedure of Appendix A as finalized in the January 2012 Final Rule.

AHAM also recommended that DOE use the same terms already existing in Figure 1 (*i.e.*, "precool cycles" instead of "precooling" and "recovery cycle" instead of "recovery"). (*Id.*) DOE reiterates that Figure 1 illustrates the concepts of precooling and recovery but does not represent all possible defrost cycles. For example, Figure 2 of Appendix A shows a different example, which has "precool" and "recovery" periods, rather than cycles. DOE does not agree that it should avoid defining the term "precooling", which is already used in section 4.2.1 of Appendix A. Hence, DOE does not consider it necessary to use the identical terminology used in Figure 1, as AHAM recommended, and is adopting the "precooling" definition as proposed, but has added text to section 4.2.1.1 of Appendices A and B to emphasize that the figure is for illustrative purposes and does not represent all possible defrost cycles.

In response to the proposed definition for "recovery," AHAM indicated that the proposal was problematic because it does not give a numerical definition of when the product has recovered and only references the temperature range. (AHAM, No. 30 at p. 20) DOE notes that the proposed recovery definition does not need a quantitative criterion. It is the period of refrigeration system operation that occurs after the defrost heater has been energized and before steady operation resumes. Hence, recovery can be considered to be complete when steady operation has resumed. This final rule adopts the recovery definition as proposed.

10. Measurement of Product Volume Using Computer-Aided Design Models

To facilitate the accurate measurement of product volume, DOE proposed to permit the use of computer aided design (CAD) models for measuring and computing the volume of refrigerators, refrigerator-freezers, and freezers for the purposes of certifying compliance with the DOE energy conservation standards for these products. 78 FR 41645–41646 (July 10, 2013). AHAM supported the DOE proposal and indicated that the proposal is consistent with current industry practice. AHAM, No. 30 at pp. 5–6) As a result, DOE is allowing CAD volume calculations to be used. This change will be made in a new section 429.72(c) of 10 CFR part 429.

DOE also proposed regulatory language explaining how DOE would measure volume and calculate the maximum allowable energy use for the purpose of assessment and enforcement testing. DOE proposed to use the average of the adjusted volumes measured for the tested units, rather than the rated adjusted volume, for calculating the allowable energy use, if the average of the total refrigerated volume measurements is not within a prescribed tolerance of the rated total refrigerated volume. This tolerance would be 2 percent of the rated volume or 0.5 cubic feet, whichever is larger, for standard-size products and 2 percent of the rated volume or 0.2 cubic feet, whichever is larger, for compact products. Whirlpool supported this proposal. (Whirlpool, No. 27 at p. 4) DOE proposed to add a new section 429.134 of 10 CFR part 429 to include the proposed volume requirements. DOE received no objections to this approach and is adopting these proposals.

11. Corrections to Temperature Setting Logic Tables

The July 2013 NOPR proposed corrections to the temperature setting logic tables in Appendices A and B. 78 FR 41646–41647 (July 10, 2013). The December 16, 2010 Interim Final Rule established these tables to illustrate the requirements for setting temperature controls during testing. However, these tables were added to the CFR with extra horizontal lines that make the requirements unclear. DOE received no

comment opposing the proposal to correct these logic tables. As a result, DOE will adopt the proposed revisions to the setting logic tables.

12. Minimum Compressor Run Time Between Defrosts for Variable Defrost Models

The DOE test procedures in Appendices A and B provide specific provisions for calculating the energy use of models with variable defrost, which DOE defines generally as an automatic defrost system in which successive defrost cycles are determined by an operating condition variable or variables other than solely compressor operating time. These calculations include CT_L (minimum compressor run time between defrosts in hours) and CT_M (maximum compressor run time between defrosts in hours). Parties must report CT_L and CT_M values to DOE in their certification reports. If a party does not report such values for a given basic model, DOE would, in any verification or enforcement testing of the basic model, calculate the energy use of the basic model using the default values of 6 and 96 for CT_L and CT_M.

When DOE uses the CT_L and CT_M values reported by the manufacturer rather than the default values, the resulting energy use measurements are typically more representative of the product's actual operation because they represent the actual minimum and maximum amounts of compressor run time between defrosts that the model's control system is designed to use. Thus, the actual compressor run time between defrosts should never be less than CT_L and never greater than CT_M. However, in certain DOE testing of models for which the manufacturer reported values of CT_L and CT_M in the certification report, DOE has found that the number of hours of compressor operation between defrost cycles observed in the test data was less than the CT_L value reported by the manufacturer in its certification report. This difference suggests either that the certified value was erroneous or that the model did not operate as designed. In either case, the energy use calculated using the values reported by the manufacturer would not be representative of how the model actually performed during the test and how it would be expected to perform in the field. In the July 2013 NOPR, DOE proposed to require that the value for CT_L be the shortest compressor run time between defrosts observed during the test, if this observed time is less than the value of CT_L reported in the certification report. 78 FR 41647 (July 10, 2013).

AHAM supported this proposal but explained that products with demand defrost (*i.e.*, those that do not have an algorithm with values of CT_L and CT_M, but instead defrost when necessary) should not be penalized for an observed value of compressor run time between defrosts lower than six hours, which is the CT_L value that would be used according to Appendix A as finalized by the January 2012 final rule. (AHAM, No. 30 at p. 22) (Decreasing CT_L would increase the calculated annual energy use.) DOE is not convinced that a CT_L value equal to 6 hours is the most appropriate value to represent defrost energy use, if a shorter value is observed during testing, because it would yield an inaccurate representation of the tested unit's energy use. However, DOE is concerned about inconsistency in test results that may occur if the proposal is adopted. For instance, the observation of compressor operation less than six hours between defrosts may be a random occurrence, dependent on a variety of factors that lead to the control system determining that a defrost is necessary. Such an event may occur sporadically, which could yield inconsistent test results for different tests of the same unit or different units of the same model. DOE may revisit the issue in a future rulemaking, but is not adopting the proposal for use of the observed value of minimum compressor run-time between defrosts in this final rule for products with no values of for CT_L and CT_M in the algorithm. Instead, the test procedure retains the existing requirements pertaining to the use of a minimum CT_L value of 6 hours where there are no values for CT_L and CT_M in the algorithm, and will require use of the minimum observed value of CT_L if less than the certified value, but will require that it be no less than 6 and no greater than 12.

13. Treatment of "Connected" Products

As part of the Version 5.0 ENERGY STAR Specification for Residential Refrigerators and Freezers, DOE developed, in cooperation with the EPA, specifications and test methods for refrigerators and refrigerator-freezers that have the capability to enable consumer-authorized energy related commands, such as demand-response signals from a utility.[17] Products with this capability are referred to generally as "connected" products in the final draft version of ENERGY STAR Version 5.0 and its associated test method. (ENERGY STAR Connected Refrigerators and Freezers Final Draft Test Method, No. 14) The draft test method addresses aspects of testing specific to the demand response functionality, but refers to the DOE test procedure in Appendix A to Subpart B of 10 CFR Part 430 for test setup and test conditions. However, the Appendix A test procedure finalized in the January 2012 Final Rule does not address whether the communication module of a connected product should be in active communication mode or a non communicating mode during the standard DOE energy test, which is used in section 6 of the demand response test to establish the baseline energy consumption. (ENERGY STAR Connected Refrigerators and Freezers Final Draft Test Method, No. 14, p. 3)

After carefully considering how to address connected products, DOE views connectivity as a feature that is subject to section 5.5.2.e of HRF–1–2008, which Appendix A incorporates by reference. That provision states that customer accessible features, not required for normal operation, which are electrically powered, manually initiated, and manually terminated, shall be set at their lowest energy usage positions when adjustment is provided. In the NOPR, DOE applied this approach to cabinet-integrated communications modules on the basis that this feature is not required for normal operation of the product. To ensure that Appendix A provides sufficient clarity on the condition of the communication module of connected products during the DOE energy test, DOE proposed to amend section 2 of the Appendix A test procedure to specify that the communication module, if integrated into the cabinet, must be energized but placed in the lowest energy use position, and there shall be no active communication during testing. DOE noted that some products may be manufactured without an integrated communication module, and instead will have the capability to allow connection of a module supplied by another manufacturer. In these cases, DOE would not specify a test condition for the communication module since the module used for the test will not be part of the basic model produced by the manufacturer. Thus, the proposed amendment to section 2 of the test procedure did not require connection of communication modules for products designed for use of an externally connected module. Finally, while the ENERGY STAR specification for connected products addresses only refrigerators and refrigerator freezers, DOE also proposed to add the same provisions to Appendix B to

[17] For additional background on the ENERGY STAR Version 5.0 Specification for Residential Refrigerators and Freezers, go to *https://energystar.gov/products/specs/node/125*

accommodate any future provisions made for connected freezers. 78 FR 41647 (July 10, 2013).

AHAM opposed the DOE proposal. AHAM indicated that a communication module's connection to a network may not be the lowest energy use position because the energy consumed is not completely in the manufacturer's control. AHAM claimed that the energy consumption when connected to a network mode will vary depending on transmission range, networking technology deployed, and the size and frequency of the data transmissions, all of which may be influenced by devices outside the refrigerator or by parties other than the manufacturer. (AHAM, No. 30 at p. 22)

AHAM also stated that the DOE proposal encourages manufacturers to not integrate communication modules within units because models that do not have integrated communication modules would not need to be tested while connected to a network. (AHAM, No. 30 at p. 22) DOE noted in the July 2013 NOPR that it could not require that models without integrated communication modules be tested with the modules energized, because the designs of third party modules are not standardized and manufacturers of the refrigeration products cannot generally specify which modules are used with their products. Therefore, requiring products to be tested with an external communication device would not be appropriate.

DOE's key concern regarding on board communication modules is that the test procedure should measure the energy that the module may use even when the product is not connected to a network for demand response control. However, DOE recognizes that there would be a potential disincentive to design products with on board modules if the test required that they be energized and connected during the test. Hence, DOE has modified its proposed approach concerning communication modules by requiring that products with on board modules be tested in the configuration in which they leave the factory, rather than being energized and connected to a network. These changes are made in section 2.11 of Appendix A and 2.8 of Appendix B. DOE expects that, under this requirement, manufacturers will ship the units in their lowest energy use state, and the energy use associated with the communication module should be nearly or exactly zero, essentially equivalent to the non-existent module power contribution for test of a product designed to use an external communication module.[18]

While DOE has some concerns about communication modules engaged in intermittent higher-energy-use operations when in the presence of communications networks, there is insufficient information at this time regarding the potential for such operation and the likely energy use impact. Furthermore, DOE recognizes that it may be a challenge to develop a test procedure that provides consistent and accurate measurement of the energy use of such communications modules that is representative of their field energy use. DOE may consider development of such a test in the future.

14. Changes to Confidentiality of Certification Data

Section 429.14(b) specifies the data that manufacturers of residential refrigerators, refrigerator-freezers, and freezers must provide to DOE when certifying compliance for each basic model. Data submitted for the items in paragraph (b)(2) (*e.g.*, annual energy use and total adjusted volume) are treated by DOE as public data whereas the data for items in paragraph (b)(3) (e.g., the values for CT_L and CT_M used in the energy use calculation in section 5.2.1.3) are evaluated on a case by case basis. The items listed in paragraph (b)(3) include specific information related to variable defrost control, variable anti sweat heater control, and the use of alternate temperature sensor locations. For models with variable defrost and variable anti sweat heaters, manufacturers must notify DOE whether certain products have these features, the values for anti sweat heater power levels at 10 different relative humidity conditions, and the values of the variable defrost parameters, CT_L and CT_M. Since publishing the current version of section 429.14, DOE has determined that there is no clear reason why whether a model has variable defrost, whether a model has variable anti sweat heater control or whether the manufacturer used alternate temperature sensor locations should not be public information. DOE proposed to move these items to paragraph (b)(2), making them public data. The other details of variable defrost operation and variable anti-sweat heater control would remain in paragraph (b)(3).

GE, AHAM, Whirlpool, and FSI all submitted comments opposing the DOE proposal. AHAM's comment stated its preference that this information not be made public. (AHAM, No. 30 at pp. 23–24) AHAM stated that DOE could seek additional information from manufacturers on a case-by-case basis, such as the specific locations of temperature sensors. (*Id.*) For its explanation of why the information should be treated as confidential, AHAM referred to the comments it made in response to the compliance, certification, and enforcement rulemaking that resulted in the March 7, 2011 final rule (*see* Docket EERE–2010–BT–CE–0014, No. 98 at p. 6). DOE notes, however, those comments addressed the confidentiality of the CT_L and CT_M values and the actual sensor placement locations—none of which DOE proposed to make public. FSI commented that how each manufacturer obtains the energy consumption of models should be kept confidential. FSI also stated that simplifying the CCMS reporting would be beneficial to all companies, especially smaller companies. (FSI, No. 20 at p. 8) DOE notes that variable defrost can be considered a standard feature for products with electronic controls, which provide the capability to determine the appropriate defrost frequency. GE stated, without further explanation, that information regarding the presence of either variable defrost or variable anti sweat heaters constitute trade secrets and should not be made public. (GE, No. 31 at p. 9) Contrary to GE's assertion, however, many manufacturers, including GE, have applied for test procedure waivers for models with variable anti sweat heater controls and have publicly provided a list of models that have this feature. DOE also notes that 33 percent of the models in the CCMS database have been reported to have variable defrost and 5 percent have been reported to have variable anti sweat heaters, suggesting that these features are fairly common among models available in the industry. For these reasons, and the absence of any specific reasons demonstrating that the presence of these features in already marketed products constitutes a trade secret or that their disclosure would be likely to cause substantial competitive harm, DOE does not believe that revealing the presence of these features reveals any part of a model's design that could be considered a trade secret or confidential commercial information. However, because several of the comments suggest that parties may have misunderstood the

[18] Since units will be tested in their "as shipped" condition, a unit that is not shipped in its lowest energy use condition will use a higher amount of energy than if it had been shipped in the lowest energy use condition. Consequently, manufacturers will have a strong incentive to ensure that all units are shipped set to their lowest energy use setting.

information DOE proposed to make public, DOE will allow another opportunity for comment in another rulemaking prior to reaching a final decision regarding this aspect of its proposal.

15. Package Loading

Section 2.2 of the DOE test procedure for residential freezers, which is located in appendix B1 to subpart B of 10 CFR part 430 (Appendix B1), references the HRF–1–1979 test procedure for provisions related to certain operational conditions and product set-up procedures. Among these is a specific provision described in section 7.4.3.3 of HRF–1–1979, which requires that the freezer compartment be loaded to 75% of the maximum number of filled packages that can be fitted into the compartment, and that the 75% load be fitted into the compartment to permit air circulation around and above the load. The requirements applicable to these products in appendix B to subpart B of 10 CFR part 430 (Appendix B) and the section it references in the HRF–1–2008 procedure (section 5.5.5.3) are identical except that package loading is required only for manual defrost freezers, whereas it is required by HRF–1–1979 for all freezer types.

DOE learned that test laboratories may not all use the same approach to determine the number of packages they must load into a unit prior to testing. To ensure consistency, DOE proposed a method that would require an initial step of filling the compartment completely with as many packages as physically possible. This step would provide an indication of the number of packages required for a 100% fill. The tester would then calculate the number of packages required for a 75% fill, remove packages based on the calculation to achieve the required 75% fill, and adjust the packages to ensure the necessary air gaps and the tiered or pyramid form needed for thermocouple placement. DOE proposed placing the description of this method in section 2.9 of Appendix B. The proposed text specified that the number of packages representing the completely filled condition and the number left in the compartment for the test should both be recorded in the test data and maintained as part of the test record in accordance with 10 CFR 429.71. Because section 5.5.5.3 of HRF–1–2008 also applies these requirements to each shelf of a multi-shelf freezer, the requirement to count and record the number of packages would apply on a per-shelf basis for such products. 78 FR 41649 (July 10, 2013).

GE, Whirlpool, and AHAM all agreed with DOE's proposed package loading procedures. (GE, No. 31 at p. 8; Whirlpool, No. 27 at p. 4; AHAM, No. 30 at p. 23) Therefore, this final rule adopts this amendment with one further minor clarification: In the event that the 75% loading calculation results in a fraction, parties shall round to the nearest whole number to determine the required number of packages for loading.

16. Product Clearance to the Wall During Testing

In the December 16, 2010 interim final rule, which established Appendices A and B, DOE included provisions to address product clearances to the wall during testing. 75 FR 78810. Specifically, section 2.8 of Appendix A and section 2.6 of Appendix B both require that the space between the plane of the cabinet's back panel and the vertical surface behind the cabinet (*i.e.*, the test chamber wall or simulated wall) be the minimum distance in accordance with the manufacturer's instructions or 2 inches, whichever is less. These sections specified that if the product has permanent rear spacers that extend beyond this distance, the product must be located with the spacers in contact with the vertical surface. However, DOE received a request for guidance from AHAM dated May 22, 2013 (AHAM Guidance Request) indicating that these provisions may not be sufficiently clear for cases in which the back of the test unit is not all on one plane due to protrusions or surface irregularities (AHAM Guidance Request, No. 15, p. 2) AHAM requested that DOE clarify these sections by referencing the Committee Draft for Vote (CDV) version of Part 1 of IEC 62552:2 *Household refrigerating appliances—Characteristics and test methods*. According to AHAM, this reference provides guidance on product to rear wall spacing that is consistent with section 2.8 but is more specific regarding the treatment of irregular surfaces.

Because the IEC reference that AHAM suggested was not finalized by the time of the NOPR, and because DOE generally seeks to limit the number of external references incorporated in the DOE test procedure, DOE declined to propose incorporation by reference of the IEC procedure that AHAM suggested. However, to improve consistency in testing, DOE proposed to adopt revised language for section 2.8 that is intended to accomplish the same objective. Specifically, DOE proposed to specify that, for the purposes of determining the appropriate clearance to the wall for the test, the rear plane of the cabinet is the largest flat surface at the rear of the cabinet. The proposed test procedure would also have indicated that individual features, such as brackets, compressors, or condensers that protrude from the rear plane could not be used as the basis for determining the rear clearance. AHAM agreed with this DOE proposal. (AHAM, No. 30 at p. 9)

PAPRSA opposed this proposal, explaining that disallowing manufacturers to measure rear wall clearance from the plane of a rear wall-mounted external condenser represents an unfair burden on products with rear-mounted condensers. PAPRSA explained that the proposed requirement would leave manufacturers with less than 12 months to develop measures to make up for the additional reduction in rear-wall clearance under the new September 15, 2014 standards. (PAPRSA, No. 28 at p. 2) Based upon PAPRSA's comments, DOE agrees that there are valid reasons to consider a rear-mounted condenser as the rear plane of the cabinet for the purposes of positioning the unit for testing, provided that the heat exchanging portion of the condenser is in fact mounted on the rear of the cabinet and consists of a uniformly flat (plane shaped) array of refrigerant tubes (*i.e.*, not a rear mounted condenser that is nearly uniformly flat, but with one or two refrigerant tubes protruding farther beyond the rear surface of the cabinet than the main plane of the condenser) DOE has modified the proposal to allow a rear wall condenser to be considered the rear plane if it is plane shaped and if the total surface area of the condenser plane is at least one quarter of the total area of the rear face of the cabinet (*i.e.*, the unit's height times its width). This ratio is based upon DOE's evaluation of products currently available on the market that have rear mounted condensers and is intended to include all such products that would be most appropriately tested using this provision. The modified language provides a tolerance on flatness of the rear wall condenser of plus or minus one quarter inch (*i.e.*, the plane would have to be uniformly flat) and indicates how the area of the rectangular plane would be determined. Therefore, today DOE adopts the proposal for rear clearance except that it allows rear-wall condensers that are planar and sufficiently large to be considered the rear plane for the maximum 2-inch clearance requirement.

FSI disagreed with the proposed exclusion of protrusions extending beyond the rear plane when considering

the rear-wall clearance, indicating that there may be many design reasons to include such protrusions. FSI also commented that DOE's discussion regarding products that might be installed with a slight rear tilt was unnecessary because manufacturers' installation instructions generally require level installation. (FSI, No. 20 at p. 9) DOE believes that the exclusion of protrusions is necessary in order to ensure consistency in test results. There may be multiple protrusions, and it may not be clear which protrusion is the appropriate one for measuring the rear clearance. In addition, allowing the clearance to be measured from a small protrusion incentivizes the incorporation of a minor extension beyond the rear plane simply to obtain additional clearance for the test, while the protrusion would most likely be pushed against the rear wall in field installations. Hence, this final rule retains, in section 2.8 of Appendix A and 2.6 of Appendix B, the requirement that clearance be measured from the rear plane. Regarding the potential for rearward tilt, the proposed language simply addresses set-up requirements in cases in which the manufacturers' instructions lead to installing the unit such that the rear plane is not perfectly parallel to the rear wall. Since DOE has identified products for which the manufacturer's instructions would result in installation with a slight rearward tilt, DOE believes that adopting this provision as proposed will more accurately reflect the intended use of each product and will have no effect on products for which the instructions do not result in a rearward tilt.

17. Other Minor Corrections

In the July 2013 NOPR, DOE noted a minor error in section 6, "Calculation of Derived Results From Test Measurements," of Appendix A. Section 6.2.2.2 provides the method for calculating average per-cycle energy use ("E") for refrigerators and refrigerator-freezers through calculations based on compartment temperatures. This section currently states that "E" is defined in section 6.2.1.1. However, section 6.2.1.1 did not define the term "E" and contained only the equation E = ET1 + IET, which DOE felt did not sufficiently clarify the term's meaning. Since the term "E" has the same basic meaning for all portions of section 6.2, DOE proposed to define this term in the introductory text of section 6.2 and to modify the text in the subsequent sections to refer to the definition consistently. For consistency, DOE proposed nearly identical changes for Appendix B. DOE received no comment opposing this proposal and therefore adopts this change in this final rule.

DOE also noted that a certain aspect of the definition of "compact refrigerator/refrigerator-freezer/freezer" in 10 CFR 430.2, which distinguishes the product classes in section 430.32(a) for compact products from the classes for standard size products, could potentially cause confusion. Specifically, compact products are defined to be under 7.75 cubic feet in volume. The definition used the term "rated volume," which is not defined or listed elsewhere in DOE's test procedures or reporting requirements for these products. The definition is intended to refer to "total refrigerated volume," but "rated volume" could potentially be confused with "adjusted volume," which is a different measurement. To prevent confusion regarding the applicability of this definition, and to ensure standard terminology is used throughout DOE's regulations, DOE proposed to amend the definition of "compact refrigerator/refrigerator-freezer/freezer" in 10 CFR 430.2 to specifically indicate that the definition applies to the product's total refrigerated volume. DOE received no comments in opposition to this proposal and therefore adopts this change in this final rule.

AHAM raised other minor issues in its guidance request to DOE dated May 22, 2013, referred to previously in section III.C.13. See also 79 FR 41649. AHAM stated that the last sentence of the existing definition of "Defrost cycle type", found in section 1.9 of Appendix A (as finalized by the January 2012 Final Rule), may be causing confusion. This sentence states that "defrost achieved regularly during the compressor off-cycles by warming the evaporator without active heat addition is not a defrost cycle type." AHAM stated that this sentence could be interpreted as indicating that off-cycle defrost is not considered to be a type of automatic defrost. (AHAM Guidance Request, No. 15, p. 2) DOE inserted the clause in section 1.9 regarding off-cycle defrost as part of the December 2010 Interim Final Rule in response to AHAM's comments during that rulemaking that off-cycle defrost should not be considered a defrost cycle type. 75 FR 78838 (Dec. 16, 2010). This clause was intended to distinguish off-cycle defrosts from the unique types of defrost cycles that involve a defrost heater, whose energy use contributions must be measured individually for products with multiple defrost cycle types. See Appendix A, section 4.2.4. However, as AHAM pointed out in its recent comments, the current language in section 1.9 is not intended to indicate that off-cycle defrost is not a form of automatic defrost. DOE clarified this issue as part of the preliminary analysis for the energy conservation standard rulemaking that ended September 15, 2011. (Energy Conservation Standards for Residential Refrigerators, Refrigerator Freezers, and Freezers, 2009–12–10 Public Meeting Presentation Slides, Docket No. EERE 2008–BT–STD–0012, No. 28 at p. 21)

DOE understands AHAM's concerns about possible misinterpretation of the cited sentence. To resolve this issue, DOE proposed to revise the definition of "defrost cycle type" in section 1.9 of Appendix A to clarify that off-cycle defrost is a form of automatic defrost, even though it is not considered a defrost cycle type for the purposes of the test procedure for products with multiple defrost cycle types. AHAM supported the proposed revision. (AHAM, No. 30 at p. 24) As a result, DOE is adopting the revised definition in this final rule for section 1.11 of Appendix A.

18. Relocation of Shelving for Temperature Sensors

HRF–1–2008, section 5.5.4, which is incorporated into the DOE test procedures by reference (*See* section 2.2 of Appendices A and B), requires at least one inch of air space separating the thermal mass of a temperature sensor from contact with any surface. In the case of interference with hardware at the specified sensor locations, section 5.5.4 requires that the temperature sensors be placed at the nearest locations such that there will be a one-inch air space separating the sensor mass from the hardware. In the July 2013 NOPR, DOE stated that, if the sensor is near shelving or other components whose position is adjustable by the consumer, it is more appropriate to relocate the shelf or component than to relocate the sensor. However, HRF–1–2008 section 5.5.2(a) requires that shelves and bins be evenly spaced throughout the compartment. As a result, DOE proposed to revise the test procedures to indicate that temperature sensor location would take precedence over the position of shelving and components whose position is adjustable by consumers, even if this means that the separation between shelves is not precisely equal. Specifically, DOE proposed to add language to Appendices A and B, section 5.1, indicating that consumer-movable shelves and other components should be moved to maintain temperature sensor clearance requirements, allowing the temperature

sensor locations to remain as specified in HRF–1–2008 Figure 5–1 or 5–2, but that parties should otherwise adhere as closely as practicable to the shelf placement requirements of section 5.5.2 of HRF–1–2008 (including the requirement that shelves and door bins be evenly spaced). 78 FR 41649 (July 10, 2013).

AHAM commented that the DOE proposal will impact some products significantly more than others. AHAM claimed that the range of impacts is so great that DOE should not make this change to the test procedure at this time. AHAM also stated that DOE's proposal could result in measurements that are unrepresentative of actual consumer use. The test data AHAM provided showed an average impact of −0.58 kWh per year with a range of −2.1 kWh per year to +1.8 kWh per year. (AHAM, No. 30 at p. 10) DOE agrees that the proposal may have an impact on measured energy use for a small percentage of products. Therefore, DOE will not adopt its proposal to prioritize temperature sensor locations over shelf placement. More specifically, the test will require that the shelves be placed in accordance with the requirements in section 5.5.2 of HRF–1–2008, and the sensors then be placed in the locations required in Figure 5–1 or 5–2 of HRF–1–2008. If the sensors cannot be placed in those locations due to interference with hardware, they must be relocated as to maintain the required 1-inch air gap between the sensor and adjacent hardware.

Further, DOE is modifying the language in section 5.1 of Appendices A and B. In each appendix, this section (1) explains where parties must place temperature sensors and (2) requires parties that use alternative sensor locations for a particular basic model to (a) record the locations in the test data maintained in accordance with 10 CFR 429.71 and (b) report the use of "non-standard" temperature sensor locations in certification reports for the basic model, as required by 10 CFR 429.14(b)(3). DOE is revising this section to specify that this reporting is required if the sensors are moved by any amount from the locations specified in Figure 5–1 or 5–2 of HRF–1–2008 in order to maintain the required 1-inch clearance from adjustable shelves or other components whose location is consumer-adjustable. Such reporting will give DOE notice in the case of verification testing that special attention must be paid to the specific locations of temperature sensors and shelves to ensure both are located in a manner consistent with the approach used in certification tests. Further, if there is any question about the locations, DOE may request manufacturers' test reports to review exact locations of the sensors and components.

D. Other Matters Related to the Test Procedure and Discussion of Proposals Not Adopted in This Final Rule

1. Icemaking Test Procedure

Nearly all refrigerator freezers currently sold either have a factory installed automatic icemaker or are "icemaker kitable" *i.e.*, they are manufactured with the necessary water tubing, valve(s), and icemaker mounting hardware to allow quick installation of an automatic icemaker at any time after the product leaves the factory. Ice production increases the energy use of a refrigerator freezer in two ways: (1) Some icemaker components (e.g., the mold heater and the gear motor) consume energy, and (2) additional refrigeration is required to cool and freeze incoming water and to remove the heat generated by icemaker components (e.g., the mold heater). The current test procedure for refrigerators and refrigerator freezers does not measure the energy use associated with ice production. Specifically, HRF–1 1979, section 7.4.2 (which is incorporated by reference into Appendix A1) states, "Automatic icemakers are to be inoperative during the test".

In the May 2010 NOPR DOE issued when proposing amendments to the test procedure that will become required later this year, DOE indicated that energy use associated with automatic icemaking represents 10 to 15 percent of the rated energy use of typical refrigeration products. See 75 FR 29846–29847 (May 27, 2010). As discussed in section I of this rule, stakeholders commented, in response to DOE's presentation of its preliminary analysis supporting the recently completed energy conservation standard rulemaking, that the test procedures and energy conservation standards for refrigeration products should address icemaking energy use. (*See, e.g.,* Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2008–BT–STD–0012; ACEEE, No. 46 at p. 1).

However, stakeholders also commented that a test procedure to measure icemaking energy use had not yet been sufficiently developed. (Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2008–BT–STD–0012; AHAM, No. 37 at p. 2: General Electric, No. 40 at p. 1) To avoid delaying the energy conservation standard rulemaking, DOE published the new Appendix A test procedure and related energy conservation standard with a fixed placeholder energy use value of 84 kWh per year for products with automatic icemakers, to represent the average amount of energy consumed in ice production. 75 FR 78842–78843 (Dec. 10, 2010) and 76 FR 57538 (Sept. 15, 2011). (The 84 kWh per year value is equivalent to the 0.23 kWh per day value found in Appendices A and B, Section 6.2.2.1. That 0.23 kWh per day value is multiplied by 365 (*See, e.g.,* 10 CFR 430.23(a)(1)), which yields an annual consumption of 84 kWh per year.)

In 2010, joint stakeholders, including manufacturers and efficiency advocates, drafted a consensus agreement that outlined recommendations for new energy and water conservation standards, test procedures, tax incentives and ENERGY STAR criteria for major home appliances. As part of that agreement, AHAM agreed to develop an icemaking test procedure before January 1, 2012. (Test Procedure for Residential Refrigerators, Refrigerator Freezers, and Freezers, Docket No. EERE–2009–BT–TP–0003, Joint Comment, No. 20 at p. 5) In early January 2012, AHAM provided DOE with a draft of its icemaking test procedure, "AHAM Refrigerator, Refrigerator-Freezer, and Freezer Ice Making Energy Test Procedure, Revision 1.0—12/14/11". (AHAM Draft Test Procedure, No. 4) That draft indicated that it would apply to refrigerators, refrigerator-freezers and freezers, as defined in 10 CFR 430.2, that are equipped with a single automatic icemaker (including non-icemaker-equipped models that could be readily retrofitted with an optional automatic icemaker).

In July 2012, AHAM provided DOE with a revision of its icemaking test procedure, "AHAM Refrigerator, Refrigerator-Freezer, and Freezer Ice Making Energy Test Procedure, Revision 2.0—07/10/12". (AHAM Revised Draft Test Procedure, No. 5) The AHAM Revised Draft Test Procedure would have applied to products that have one or more automatic icemakers. In addition, it includes several revisions to the AHAM Draft Test Procedure.

The July 2013 NOPR proposed an icemaking test procedure based largely on the AHAM Revised Draft Test Procedure. However, stakeholders requested additional time to review and comment on DOE's proposal. (AHAM, No. 24 at p. 1) In order to allow stakeholders additional time to review its proposed amendments for measurement of icemaking energy use,

DOE will delay finalization of these amendments. As part of this process, DOE will provide the public with an additional opportunity to weigh in with their views regarding the icemaking test procedure through public notice and comment. Consequently, this final rule includes no amendments to the test procedures associated with measurement of icemaking energy use.

The July 2013 NOPR also proposed to define "through-the-door ice and water dispenser," explaining that this term appears in discussions of both icemaking operations and volume calculations within HRF–1–2008, which is incorporated by reference in Appendices A and B. The proposed definition indicated that a through-the-door ice/water dispenser could dispense ice only, both ice and water, or water only. 78 at 41620 (July 10, 2013). AHAM commented that the "through-the-door ice and water dispenser" definition should not include "water only" dispensers because this language would confuse product class determinations. (AHAM, No. 24 at p. 8–9) DOE agrees that, although an ice and water dispenser may dispense water, the term as used in HRF–1–2008 is not intended to denote water-only dispensers. Hence, this final rule modifies the definition so that it applies to ice-only and ice/water dispensers, but not water-only dispensers.

2. Built-In Refrigeration Products

The July 2013 NOPR provided data showing the impact on measured energy use of testing built-in products in a built-in configuration. DOE requested information from stakeholders regarding this issue, including (a) additional data showing the impact on the energy use measurement of testing such products in a built-in condition, (b) the test burden that would be incurred with such a requirement, and (c) whether the DOE test procedure should require testing of built-in products in a built-in condition. AHAM requested an extension of the comment period to January 31, 2014, to allow stakeholders more time to prepare comments on this issue. (AHAM, No. 24 at p. 1) DOE granted this request. Hence, given the need for DOE to thoroughly review these comments and any accompanying data, DOE will address this issue more fully in a future notice.

3. Specific Volume Measurement Issues

As part of the same May 22, 2013 guidance request referred to previously in this final rule, AHAM requested that DOE clarify certain provisions of its prescribed method for measuring product interior volume in section 5.3 of Appendices A and B. Section 5.3 references section 4 of HRF–1–2008 in both Appendices A and B. Section 4.2.2 of HRF–1–2008 lists several components that parties must deduct from the measured interior volume, including "the volume of air ducts required for proper cooling and operation of the unit." Specifically, AHAM asked DOE whether this particular provision includes only air ducts that supply cold air to the fresh food and freezer compartments, or to all air ducts within the unit. (AHAM Guidance Request, No. 15, p. 2) The guidance request did not include specific examples of ducts other than those that supply air to the fresh food and freezer compartments, which are both required for proper cooling and operation of the unit. In the July 2013 NOPR, DOE stated that it was aware of air ducts used to cool icemaking compartments and that such ducts would also be required for proper operation of any refrigeration product that is equipped with an automatic icemaker, or any kitable product with an icemaking compartment that could have an automatic icemaker installed after shipment. As of the July 2013 NOPR, DOE was not aware of any other specific examples. However, since the volume measurement method generally excludes volumes occupied by components that are not intended to be removed by the user and that occupy space that cannot be used for storage, which are both likely to apply to an air duct, DOE took the view that parties should deduct the volume of any air duct in the interior of the cabinet from the measured product volume.

AHAM responded by asking DOE not to require deduction of the measured volume of all air ducts in the interior of the cabinet, such as those that transfer cold air from an interior compartment to another enclosed space within the compartment. AHAM stated that DOE may have misunderstood the use of the term "unit" in HRF–1–2008, which AHAM claimed is intended to refer to the entire refrigeration system, and suggested that DOE may be interpreting "unit" to mean the entire product. As explained by AHAM, the air ducts that are required "for the proper operation of the unit" are those required for providing air flow from the refrigeration system to the fresh food/freezer/separate auxiliary compartments and that air ducts that supply fresh food, freezer, and separate auxiliary compartments should be deducted from the total volume, which is consistent with the DOE view expressed in the July 2013 NOPR. However, AHAM also indicated that the temperature inside special compartments and icemaker compartments are not included in the overall compartment temperature measurement, and thus their associated air ducts should not be required for proper operation of the refrigeration system. (AHAM, No. 30 at p. 7)

DOE responded to AHAM's request for clarification on whether the air duct volumes are included in the measured volume in the July 2013 NOPR by clarifying how the currently required test procedure must be followed. Further, DOE notes that HRF–1–2008 is not sufficiently descriptive as to indicate that certain ducts are treated differently from others for the purposes of volume measurement, or that the term "unit" has a specific meaning within this particular context. DOE's interpretation is based upon the past use of the term "unit," which it believes is otherwise consistent with the remainder of the HRF–1–2008 test procedure, the DOE test procedure, and the testing methods for other products. Hence, DOE has not modified its interpretation that the volume of any air ducts in the cabinet would be deducted from the product's total refrigerated volume.

In addition, the July 2013 NOPR clarified whether the volume of water tanks used for chilling of water to be dispensed in a product's water dispenser should be included or excluded in the calculation of total refrigerated volume. The NOPR indicated that if a water tank is integral to a product's dispenser, it would be excluded from the volume, but that otherwise, it would be included. 78 FR 41651 (July 10, 2013). AHAM commented that the tank would always be in the product's refrigerated space and thus should always be included in the product's total refrigerated volume, regardless of its proximity to the dispenser. (AHAM, No. 30 at p. 7) After consideration of AHAM's comment, DOE agrees that the volume of any water tank housed within the refrigerated space should be included in the calculation of total refrigerated volume. and notes that this provision is not limited to water tanks, but would apply to any other component that is located entirely within the refrigerated volume and not specifically excluded from the volume measurement by section 4.2.2 of HRF–1–2008.

4. Treatment of Products That Are Operable as a Refrigerator or Freezer

In the July 2013 NOPR, DOE addressed concerns regarding the appropriate test setting for products with a single compartment that can operate either as an electric refrigerator or freezer, as defined in 10 CFR 430.2. DOE noted that section 2.7 of Appendix

A1 and Section 2.7 of Appendix A both require compartments that are convertible (*e.g.*, from fresh food to freezer) to be operated in the highest energy use position. In the case of a product for which the convertible compartment is the only compartment (*i.e.*, the entire product is convertible), the product effectively meets the definitions of two different covered products. In July 2013 NOPR, DOE stated that if the product is marketed as both an electric refrigerator and as a freezer, the product must be tested as both covered products, must meet both applicable standards, and must be certified as meeting both standards. If, however, the product is marketed only as a refrigerator or only as a freezer, the product must (1) be tested in accordance with the applicable test procedure, (2) meet the appropriate standard for that product, and (3) be certified accordingly. 78 FR 41651 (July 10, 2013).

AHAM commented that the DOE proposal for convertible products would impose an added test burden on manufacturers. Instead, AHAM suggested that DOE require that products be tested in the most energy intensive position, which AHAM claims is consistent with industry practice. (AHAM, No. 30 at p. 24) AHAM acknowledges that its own suggestion would still require test facilities to test convertible products as both a refrigerator and a freezer, but would be less burdensome than the DOE proposal. (*Id.*) DOE notes that the most energy intensive configuration may not be the configuration for which energy use is closer to the maximum allowable energy use for that particular configuration. Specifically, in certain cases, the lower energy use position (*i.e.*, testing as a refrigerator) could result in measured energy use that is more likely to exceed the standard for the applicable refrigerator standard than the freezer standard when measured in the freezer configuration. Since such products must be able to meet the standard for each type of product, in DOE's view, certifying compliance with only one of the configurations is incomplete. After further consideration, in part based on AHAM's comment, DOE recognized that the language in the NOPR is inconsistent with the DOE's existing regulatory definitions. Therefore, to ensure that consumers receive the most accurate information, DOE is requiring that convertible products be tested and certified as both refrigerators and freezers if the products meet the applicable definition(s). Furthermore, DOE notes that the definitions are applicable to a given model based on the performance of that model when operating under typical field conditions—not at the test procedure conditions.

To ensure that this requirement is clearly indicated in the regulations, DOE has added a new paragraph 10 CFR 429.14(c) to include this requirement. Specifically, DOE will require that manufacturers certify each individual model as complying with the energy conservation standard applicable to all product classes identified in § 430.32(a) into which the individual model falls if the individual model is distributed in commerce as a model within that product class. The manufacturer must assign a different basic model number to the units in each product class even if a manufacturer uses the same individual model number to identify the product. As an example, if a single individual model were distributed in commerce as an automatic defrost all-refrigerator (product class 3A) and as an automatic defrost upright freezer (product class 9), the manufacturer could use the same individual model number but would be required to test the model according to the test procedure applicable to each corresponding product class (i.e., Appendix A for class 3A and Appendix B for class 9). The manufacturer would also need to certify each basic model separately (i.e., in product class 3A and in product class 9) using a different basic model number for the two product classes.

5. Stabilization Period

AHAM's May 22, 2013 guidance request asked whether the stabilization period (*See* section 2.9 of Appendix A1 for an example) has a maximum time constraint. (AHAM Guidance Request, No. 15, p. 4) The stabilization period for products with cycling compressors consists of two separate time periods, each of which lasts at least two hours and comprises a whole number of compressor cycles, with an intervening time period of at least three hours. Specifically, AHAM asked whether the two time periods in question have a maximum duration or if they must be selected to be as short as possible while still satisfying the requirements. (*Id.*) In the July 2013 NOPR, DOE stated that neither of these requirements is explicitly stated in the test procedure, and neither is implied. DOE further indicated that the two time periods in question may be extended, for example, if there is irregular cycling of the compressor that makes the first possible selection of such a time period non representative of the average compartment temperatures for the captured time period. However, it would not be consistent with the test procedure to select two sets of time periods that would allow stability to appear to have been achieved when it has not. Alternative selections of time periods that satisfy the test procedure requirements should also demonstrate that stability has been achieved. At the time of the July 2013 NOPR, DOE did not believe that changes to the test procedure regulatory language were required to address this issue. 78 FR 41651 (July 10, 2013).

In its comments, GE expressed concerns that DOE's view would allow selection of the three time periods used to evaluate steady state operation (*i.e.*, the two periods for which average temperatures are measured and the intervening period separating the first two) to be left wholly to the discretion of the test facility, which could result in different test results for the same set of test data. (GE, No. 31 at p. 9) However, GE did not provide specific examples that show clearly why DOE should amend the stability requirements (*e.g.*, to require the shortest stability time period that meets the requirements of section 2.9 of Appendix A). DOE believes that, in general, if stability is demonstrated for the shortest time period meeting the requirements that can be examined for a given time period of product operation, evaluation of the steady state condition should also be confirmed if different periods are selected for verifying that steady state operation has been reached. In other words, in a typical case, if the confirmation of steady state depends on the selection of specific time periods, while disregarding other adjacent time periods, the product has not fully reached steady state. In general, DOE expects that a test laboratory will select the shortest possible stabilization period in any case, in order to shorten test time. The test procedure has never had a maximum duration for the stabilization periods, and DOE believes GE's comment does not provide sufficient information to justify a maximum duration. Therefore, DOE is declining to amend the stabilization requirements in the test procedure.

E. Compliance With Other EPCA Requirements

1. Test Burden

EPCA requires that the test procedures DOE prescribes or amends be reasonably designed to produce test results that measure the energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average

use cycle or period of use. These procedures must also not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE has concluded that the amendments proposed in this final rule satisfy these requirements.

Some of the test procedure amendments made in this final rule clarify how existing provisions of the test should be conducted, or otherwise represent minor changes to the test that do not significantly affect the equipment required for testing or the time required to conduct it. These amendments include changes to the anti-circumvention language and ambient temperature gradient requirements, and clarifications regarding how to set mechanical temperature controls. AHAM suggested that ambient temperature gradient requirements could add an initial burden as test facilities adjust to accommodate the clarifying amendments. For example, laboratories may have to purchase additional thermocouples and fixtures to hang them. AHAM also suggested that ambient temperature amendments would require rewriting data acquisition software and could require some laboratories to obtain data acquisition hardware/equipment. (AHAM, No. 30 at p. 25) FSI expressed concern that the ambient temperature gradient requirements may invalidate some tests, leading to additional testing time, and that some test chambers may not be able to meet the requirements without significant facility modifications. (FSI, No. 20 at p. 8)

DOE notes that it expects test facilities may need to make slight modifications to adhere to the clarified version of the ambient temperature requirements, particularly in demonstrating that the temperature gradients have been maintained. DOE does not consider the small initial costs involved with temperature sensors and ambient temperature fixtures to be significant compared to the costs of running multiple tests. In addition, based on comments received on previous rulemaking proposals involving data collection methods, DOE expects all test facilities to already have the data acquisition systems to adhere to all of the requirements being adopted today. Therefore, DOE believes this requirement is not likely to result in a significant additional test burden. As discussed in section III.C.6, DOE considers the amendments concerning the maintenance of the ambient temperature gradient to merely clarify the test procedure by specifying how to interpret the existing requirement for maintenance of the gradient. Hence, DOE does not consider these amendments to impose any new test facility requirements.

This final rule also makes other changes, none of which would have a significant impact on burden. First, the modifications in the test procedure for incomplete cycling products could increase or decrease test time, as discussed in the NOPR. 78 FR 41641 (July 10, 2013). However, based on tests conducted by DOE, the impact on test time for the amendment being adopted does not appear significant. FSI submitted comments that suggest it would incur significant test burden because the incomplete cycling modifications would increase test complexity. (FSI, No. 20 at p.6) DOE does not agree with this claim. The DOE proposal simply aligns the test procedure for incomplete-cycling products with those for products with cycling compressors by requiring a whole number of compressor cycles—the only difference being that a single compressor cycle is acceptable if the cycle takes at least 12 hours. In DOE's view, this change does not constitute an increase in complexity. In DOE testing conducted prior to publication of the July 2013 NOPR, only four chest freezers tested have exhibited incomplete cycling. The impacts in test time for these four products were reductions for three products of 0.5, 3, and 10 hours and an increase for the fourth of 1.4 hours. 78 FR 41614 (July 10, 2103). These results show that the impact on test burden would be small and limited primarily to chest freezers.

Second, this final rule introduces an optional triangulation approach for products with two temperature controls. AHAM and FSI both submitted comments stating that reporting whether the triangulation method was used is an unnecessary burden. (AHAM, No. 30 at p. 17; FSI, No. 20 at p.5) DOE notes that it proposed to allow the use of triangulation in response to the request of stakeholders in a previous refrigeration product test procedure rulemaking and that the use of this approach, as implemented in this final rule, is on an optional basis. However, DOE has not adopted the proposed requirement to indicate in certification reports whether the method was used in testing—hence, it is DOE's belief that the amendments adopting triangulation represent no added burden.

Additionally, the test procedure modifications for products with multiple-compressors are, for the most part, consistent with the test procedures of existing test procedure waivers. This final rule eliminates most of the provisions of the multiple-compressor test procedure that DOE proposed in the NOPR that stakeholders criticized due to the potential added test burden. The key exception is the requirement that the first part of the test must be a continuous time period. However, as discussed in section III.C.1, DOE has imposed this requirement to limit the potential impact of truncation error; allowing the waiver approach could potentially introduce error in excess of the one percent that AHAM views as unacceptable. (*See* AHAM, No. 30 at p. 15)

DOE acknowledges that some test facilities may need time to adjust to the various test procedure modifications made in this final rule but believes that the modest burden associated with these adjustments is appropriate given the need for test results to be accurate and repeatable.

Other amendments, including changes to the anti-circumvention language, the specifications for setting mechanical temperature controls, and the adoption of new definitions associated with defrost cycles, would clarify the test procedures but not add any new requirements that would increase test burden.

2. Changes in Measured Energy Use

When DOE modifies test procedures, it must determine to what extent, if any, the new test procedure would alter the measured energy use of covered products. (42 U.S.C. 6293(e)(1)) For the reasons described below, DOE has determined that none of the test procedure amendments would significantly alter the projected measured energy use of covered products.

The test procedure amendments in this final rule would affect the test procedures that will be required for certifying compliance with the amended energy conservation standards, the compliance date of which is September 15, 2014. Table III–1 indicates which parts of DOE's test procedures would be affected by this rule's amendments. As part of its evaluation of this rule, DOE has examined what impact it would likely have on the measured energy use of refrigeration products.

Many of the changes made to Appendices A and B through this final rule clarify the manner in which the test should be conducted, or otherwise represent minor changes to the test or reporting requirements that would not affect measured energy use. These amendments include changes to the anti-circumvention language, clarifications for setting mechanical temperature controls, modified ambient temperature gradient requirements, new definitions to help clarify test

requirements, elimination of the requirement to report product height, use of CAD models for measuring refrigerated volume, and corrections to the temperature setting logic tables.

The modification of the test period for products that experience incomplete cycling could affect only a small minority of products and only to a minimal extent. To DOE's knowledge, the only products that exhibit incomplete cycling are chest freezers. As described in section III.C.4, the accuracy of the measured energy use for such products would be improved. The measured energy use, to the extent it varies, would not necessitate a change in the standards for the single class of products that could theoretically be affected by this rule's amendments. For these reasons, DOE does not believe an adjustment of the energy conservation standard is necessary for this test procedure change.

DOE's modifications addressing products with multiple-compressors are not expected to alter the measured energy use for these products. The test procedure as amended by this rule is functionally equivalent to the test procedure in the waivers that DOE has previously granted for products with multiple-compressors, differing primarily in the length and composition of test periods. AHAM commented that allowing test facilities to use temperature cycles would have a significant impact on the energy measurement. (AHAM, No. 30 at p. 11) As a result, DOE decided not to allow the use of temperature cycles to define test periods. DOE does not believe that any of the other changes applicable to products with multiple compressors are likely to affect the measured energy use of any product currently known to DOE.

As described in section III.C.2, the triangulation test method may, in certain cases, provide a slightly more accurate measurement of the actual energy consumption of a given product. This method would yield lower energy use measurements for some products as compared with the two-test method of the current DOE test procedures (*See* Appendix A1, section 3.1.2). Given that the triangulation method would be optional, in DOE's view, the overall impact of this optional test on energy use measurement will likely be insignificant and would not require any change to the relevant standards.

3. Standby and Off Mode Energy Use

EPCA directs DOE to include standby mode and off mode energy consumption when amending test procedures and that this energy consumption be integrated into the overall energy consumption descriptor for the product, unless DOE determines that the current test procedures for the product already fully account for and incorporate the standby and off mode energy consumption of the covered product. (42 U.S.C. 6295(gg)(2)(A)(i)) The DOE test procedures for refrigeration products measure the energy use of these products during extended time periods that include periods when the compressor and other key components are cycled off. All of the energy these products use during the "off cycles" is already included in the measurements. A given refrigeration product being tested could include auxiliary features that draw power in a standby or off mode. In such instances, HRF–1–1979 and HRF–1–2008, both of which are incorporated in relevant part into DOE's test procedures, generally instruct manufacturers to set certain auxiliary features to the lowest power position during testing. In this lowest power position, any standby or off mode energy use of such auxiliary features would be included in the energy measurement. As a result, the July 2013 NOPR did not propose any additional changes to account for standby and off mode energy consumption, since the current (and proposed) procedures address these modes. AHAM and GE submitted comments supporting DOE's position on this issue. (AHAM, No. 30 at p. 19; GE, No. 31 at p.9) Therefore, DOE maintains the position that no specific amendments are needed to address standby or off mode energy use for these products.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute "significant regulatory actions" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel.*

DOE reviewed the test procedures in this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This final rule prescribes test procedures that will be used to determine compliance with energy conservation standards for the products that are the subject of this rulemaking.

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121, which relies on size standards and codes established by the North American Industry Classification System (NAICS). The threshold number for NAICS code 335222, which applies to Household Refrigerator and Home Freezer Manufacturing, is 1,000 employees.

DOE conducted a market survey to determine whether any manufacturers of products covered by this final rule were small businesses. During its market survey, DOE used all available public information to create a list of companies that manufacture refrigerators, refrigerator freezers, or freezers covered by this rulemaking. DOE reviewed these data to determine whether the entities met the SBA's definition of a small business manufacturer of refrigerators, refrigerator-freezers, or freezers and screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a "small business," or are foreign owned and operated. DOE identified three small businesses at the time of the July 2013 NOPR and an additional small business presented itself during the July 2013 NOPR comment period. However, DOE initially concluded that none of the test procedure modifications adopted in this final rule would pose a significant burden on manufacturers in this industry.

FSI submitted comments indicating that, as a small business, the test procedure modifications would unfairly impact its certification activities.

Specifically, FSI argued that the following modifications would unfairly impact it: (a) Clarifications to the ambient temperature sensors requirements; (b) the optional triangulation energy calculation method; (c) modifications to the testing requirements for incomplete cycling products; and (d) clarifications to what DOE considers to make up a unit's rear wall. FSI's claims of test burden are discussed in section III.E.1 (Testing Burden). However, for the reasons discussed in section III.E.1, DOE concludes that FSI's claims of test burden are overstated.

Reiterating the conclusions enumerated above, DOE acknowledges that additional ambient temperature sensors will be required and their temperatures recorded, but this is expected to be a modest impact as compared to the overall cost associated with testing. Specifically, DOE estimated an additional cost per product test station of $395, which includes the labor involved in equipment setup. This represents approximately 1 percent of the total cost of a typical four-station test chamber, assuming additional sensors are needed for all four test stations. In the worst case, in which a test facility must purchase additional data acquisition equipment and software, the cost could be as high as $1,500, although DOE expects that few if any test laboratories would incur costs at this level. DOE further concludes that claims regarding repeated tests or test facility upgrades associated with the ambient temperature requirements would be necessary under the existing test procedures, and that the amendments of this final rule would not represent an increase in test burden beyond the requirement for sensors and added data collection to verify compliance with the requirements. DOE does not agree with FSI that the inclusion of the optional (and voluntary) triangulation test would add any burden to a manufacturer choosing not to use this method. DOE has also not adopted the proposed amendment requiring reporting of whether this optional approach is used in testing.

Therefore, DOE concludes that the test procedure amendments of this final rule will not have a significant impact on small manufacturers under the provisions of the Act. These amendments do not require use of test facilities or test equipment that differ in any substantive way from the test facilities or test equipment that manufacturers currently use to evaluate the energy efficiency of these products. Further, the amended test procedures will not be significantly more difficult or time-consuming to conduct than the current test procedures that manufacturers must use to certify compliance with the energy conservation standards that must be met. For these reasons, DOE concludes and certifies that the rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE has transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of refrigerators, refrigerator-freezers, and freezers must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for refrigerators, refrigerator-freezers, and freezers, including any amendments adopted for those test procedures. DOE has established regulations regarding the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including refrigerators, refrigerator-freezers, and freezers. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

DOE is amending its test procedure for refrigerators, refrigerator-freezers, and freezers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the amount, quality or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write

regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel.* DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedures addressed by this action incorporate testing methods contained in certain sections of the commercial standards, AHAM Standards HRF–1–1979 and HRF–1–2008. DOE has evaluated these two versions of this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in these standards and has received no comments objecting to their use.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

N. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on April 10, 2014.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE amends parts 429 and 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Section 429.14 is amended by adding paragraph (a)(3), and by revising paragraphs (b)(2) and (b)(3) to read as follows:

§ 429.14 Residential refrigerators, refrigerator-freezers and freezers.

(a) * * *

(3) The value of total refrigerated volume of a basic model reported in accordance with paragraph (b)(2) of this section shall be the mean of the total refrigerated volumes measured for each tested unit of the basic model or the total refrigerated volume of the basic model as calculated in accordance with § 429.72(c).

(b) * * *

(2) Pursuant to § 429.12(b)(13), a certification report shall include the following public product-specific information: The annual energy use in kilowatt hours per year (kWh/yr); the total refrigerated volume in cubic feet (ft^3); and the adjusted total volume in cubic feet (ft^3).

(3) Pursuant to § 429.12(b)(13), a certification report shall include the following additional product-specific information: whether the basic model has variable defrost control (in which case, manufacturers must also report the values, if any, of CT_L and CT_M (For an example, see section 5.2.1.3 in appendix A to subpart B of 10 CFR part 430) used in the calculation of energy consumption), whether the basic model has variable anti-sweat heater control (in which case, manufacturers must also report the values of heater Watts at the ten humidity levels (5%, 15%, 25%, 35%, 45%, 55%, 65%, 75%, 85%, and 95%) used to calculate the variable anti-sweat heater "Correction Factor"), and whether testing has been conducted with modifications to the standard temperature sensor locations specified by the figures referenced in section 5.1 of appendices A1, B1, A, and B to subpart B of 10 CFR part 430.

■ 3. Add § 429.72 to read as follows:

§ 429.72 Alternative methods for determining non-energy ratings.

(a) *General.* Where § 429.14 through § 429.54 authorize the use of an alternative method for determining a physical or operating characteristic other than the energy consumption or efficiency, such characteristics must be determined either by testing in accordance with the applicable test procedure and applying the specified sampling plan provisions established in those sections or as described in the appropriate product-specific paragraph below. In all cases, the computer-aided design (CAD) models, measurements, and calculations used to determine the rating for the physical or operating characteristic shall be retained as part of the test records underlying the certification of the basic model in accordance with § 429.71.

(b) *Testing.* [Reserved]

(c) *Residential refrigerators, refrigerator freezers, and freezers.* The total refrigerated volume of a basic model of refrigerator, refrigerator freezer, or freezer may be determined by performing a calculation of the volume based upon computer aided design (CAD) models of the basic model in lieu of physical measurements of a production unit of the basic model. Any value of total refrigerated volume of a basic model reported to DOE in a certification of compliance in accordance with § 429.14(b)(2) must be calculated using the CAD-derived volume(s) and the applicable provisions in the test procedures in 10 CFR part 430 for measuring volume, and must be within two percent, or 0.5 cubic feet (0.2 cubic feet for compact products), whichever is greater, of the volume of a production unit of the basic model measured in accordance with the applicable test procedure in 10 CFR part 430.

■ 4. Add § 429.134 to read as follows:

§ 429.134 Product-specific enforcement provisions.

(a) *General.* The following provisions apply to assessment and enforcement testing of the relevant products.

(b) *Refrigerators, refrigerator-freezers, and freezers*— (1) *Verification of total refrigerated volume.* The total refrigerated volume of the basic model will be measured pursuant to the test requirements of 10 CFR part 430 for each unit tested. The results of the measurement(s) will be averaged and compared to the value of total refrigerated volume certified by the manufacturer. The certified total refrigerated volume will be considered valid only if:

(i) The measurement is within two percent, or 0.5 cubic feet (0.2 cubic feet for compact products), whichever is greater, of the certified total refrigerated volume, or

(ii) The measurement is greater than the certified total refrigerated volume.

(A) If the certified total refrigerated volume is found to be valid, the certified adjusted total volume will be used as the basis for calculation of maximum allowed energy use for the basic model.

(B) If the certified total refrigerated volume is found to be invalid, the average measured adjusted total volume will serve as the basis for calculation of maximum allowed energy use for the tested basic model.

(2) *Test for models with two compartments, each having its own user-operable temperature control.* The test described in section 3.3 of the applicable test procedure for refrigerators or refrigerator-freezers in appendix A to subpart B of 10 CFR part 430 shall be used for all units of a tested basic model before DOE makes a determination of noncompliance with respect to the basic model.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 5. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 6. Section 430.2 is amended by revising the definition of "compact refrigerator/refrigerator-freezer/freezer" to read as follows:

§ 430.2 Definitions.

* * * * *

Compact refrigerator/refrigerator-freezer/freezer means any refrigerator, refrigerator-freezer or freezer with a total refrigerated volume of less than 7.75 cubic feet (220 liters). (Total refrigerated volume shall be determined using the applicable test procedure appendix prescribed in subpart B of this part.)

* * * * *

■ 7. Section 430.3 is amended by adding paragraph (e) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(e) *AS/NZS.* Australian/New Zealand Standard, GPO Box 476, Sydney NSW 2001, (02) 9237–6000 or (12) 0065–4646, or go to *www.standards.org.au/* Standards New Zealand, Level 10 Radio New Zealand House 144 The Terrace Wellington 6001 (Private Bag 2439 Wellington 6020), (04) 498–5990 or (04) 498–5991, or go to *www.standards.co.nz.*

(1) AS/NZS 4474.1:2007, Performance of Household Electrical Appliances—Refrigerating Appliances; Part 1: Energy Consumption and Performance, Second edition, published August 15, 2007, IBR approved for Appendix A to Subpart B.

(2) [Reserved]

* * * * *

■ 8. Section 430.23 is amended by revising paragraphs (a)(10) and (b)(7) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(a) * * *

(10) The following principles of interpretation should be applied to the test procedure. The intent of the energy test procedure is to simulate typical room conditions (approximately 70 °F (21 °C)) with door openings by testing at 90 °F (32.2 °C) without door openings. Except for operating characteristics that are affected by ambient temperature (for example, compressor percent run time), the unit, when tested under this test procedure, shall operate in a manner equivalent to the unit in typical room conditions.

(i) The energy used by the unit shall be calculated when a calculation is provided by the test procedure. Energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this test procedure, shall operate in an equivalent manner during energy testing under this test procedure, or be accounted for by all calculations as provided for in the test procedure. Examples:

(A) Energy saving features that are designed to operate when there are no door openings for long periods of time shall not be functional during the energy test.

(B) The defrost heater shall neither function nor turn off differently during the energy test than it would when in typical room conditions. Also, the product shall not recover differently during the defrost recovery period than it would in typical room conditions.

(C) Electric heaters that would normally operate at typical room conditions with door openings shall also operate during the energy test.

(D) Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this test procedure.

(ii) DOE recognizes that there may be situations that the test procedures do not completely address. In such cases, a manufacturer must obtain a waiver in accordance with the relevant provisions of 10 CFR part 430 if:

(A) A product contains energy consuming components that operate differently during the prescribed testing than they would during representative average consumer use and

(B) Applying the prescribed test to that product would evaluate it in a manner that is unrepresentative of its true energy consumption (thereby providing materially inaccurate comparative data).

(b) * * *

(7) The following principles of interpretation should be applied to the test procedure. The intent of the energy test procedure is to simulate typical room conditions (approximately 70 °F (21 °C)) with door openings by testing at 90 °F (32.2 °C) without door openings. Except for operating characteristics that are affected by ambient temperature (for example, compressor percent run time), the unit, when tested under this test procedure, shall operate in a manner equivalent to the unit in typical room conditions.

(i) The energy used by the unit shall be calculated when a calculation is provided by the test procedure. Energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this test procedure, shall operate in an equivalent manner during energy testing under this test procedure, or be accounted for by all calculations as provided for in the test procedure. Examples:

(A) Energy saving features that are designed to operate when there are no door openings for long periods of time shall not be functional during the energy test.

(B) The defrost heater shall neither function nor turn off differently during the energy test than it would when in typical room conditions. Also, the product shall not recover differently during the defrost recovery period than it would in typical room conditions.

(C) Electric heaters that would normally operate at typical room conditions with door openings shall also operate during the energy test.

(D) Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this test procedure.

(ii) DOE recognizes that there may be situations that the test procedures do not completely address. In such cases, a manufacturer must obtain a waiver in accordance with the relevant provisions of 10 CFR part 430 if:

(A) A product contains energy consuming components that operate differently during the prescribed testing than they would during representative average consumer use and

(B) Applying the prescribed test to that product would evaluate it in a manner that is unrepresentative of its true energy consumption (thereby providing materially inaccurate comparative data).

* * * * *

■ 9. Appendix A to subpart B of part 430 is amended:

■ a. By revising the introductory text;

■ b. In section 1. Definitions, by:

■ i. Redesignating section 1.18 as 1.26;

■ ii. Redesignating section 1.17 as 1.25;

■ iii. Redesignating section 1.16 as 1.23;

■ iv. Redesignating section 1.15 as 1.21;

■ v. Redesignating section 1.14 as 1.20;

■ vi. Redesignating section 1.13 as 1.19;

■ vii. Redesignating section 1.12 as 1.15;

■ viii. Redesignating section 1.11 as 1.13;

■ ix. Redesignating section 1.10 as 1.12;

■ x. Redesignating section 1.9 as 1.11 and revising the newly designated section 1.11;

■ xi. Redesignating section 1.8 as 1.10;

■ xii. Redesignating section 1.7 as 1.9;

■ xiv. Redesignating section 1.6 as 1.7;

■ xv. Redesignating section 1.5 as 1.6;

■ xvi. Adding sections 1.5, 1.8, 1.14, 1.16, 1.17, 1.18, 1.22, and 1.24;

■ c. In section 2. Test Conditions, by:

■ i. Revising sections 2.1, 2.2, and 2.8;

■ ii. Adding sections, 2.1.1, 2.1.2, 2.1.3, and 2.11;
■ d. In section 3. Test Control Setting, by:
■ i. Revising section 3.2.1;
■ ii. Revising Tables 1 and 2;
■ iii. Adding section 3.3;
■ e. In section 4. Test Period, by:
■ i. Revising sections 4.1, 4.2, 4.2.1.1, and 4.2.3;
■ ii. Adding sections 4.2.3.1, 4.2.3.2, 4.2.3.3, 4.2.3.4, 4.2.3.4.1, and 4.2.3.4.2;
■ f. In section 5. Test Measurements, by revising sections 5.1, 5.1.1, 5.1.2, 5.2.1.3, 5.2.1.4, and 5.3;
■ g. In section 6. Calculation of Derived Results from Test Measurements, by:
■ i. Revising sections 6.2, 6.2.1, 6.2.2, 6.2.2.1, and 6.2.2.2;
■ ii. Adding section 6.2.2.3.

The additions and revisions read as follows:

Appendix A to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Electric Refrigerators and Electric Refrigerator-Freezers

Beginning on September 15, 2014, the test procedures in appendix A must be used to determine compliance with energy conservation standards for refrigerators and refrigerator freezers. Prior to September 15, 2014, manufacturers may continue to use appendix A1 or may elect to use appendix A early to show compliance with the September 15, 2014 energy conservation standards. Manufacturers must use a single appendix for all representations of energy use of a basic model, including certifications of compliance, and may not use appendix A1 for certain representations and appendix A for other representations.

1. Definitions

* * * * *

1.5 "AS/NZS 44474.1:2007" means Australian/New Zealand Standard 44474.1:2007, Performance of household electrical appliances—Refrigerating appliances, Part 1: Energy consumption and performance. Only sections of AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) specifically referenced in this test procedure are part of this test procedure. In cases where there is a conflict, the language of the test procedure in this appendix takes precedence over AS/NZS 44474.1:2007.

* * * * *

1.8 "Complete temperature cycle" means a time period defined based upon the cycling of compartment temperature that starts when the compartment temperature is at a maximum and ends when the compartment temperature returns to an equivalent maximum (within 0.5 °F of the starting temperature), having in the interim fallen to a minimum and subsequently risen again to reach the second maximum. Alternatively, a complete temperature cycle can be defined to start when the compartment temperature is at a minimum and end when the compartment temperature returns to an equivalent minimum (within 0.5 °F of the starting temperature), having in the interim risen to a maximum and subsequently fallen again to reach the second minimum.

* * * * *

1.11 "Defrost cycle type" means a distinct sequence of control whose function is to remove frost and/or ice from a refrigerated surface. There may be variations in the defrost control sequence such as the number of defrost heaters energized. Each such variation establishes a separate distinct defrost cycle type. However, defrost achieved regularly during the compressor off-cycles by warming of the evaporator without active heat addition, although a form of automatic defrost, does not constitute a unique defrost cycle type for the purposes of identifying the test period in accordance with section 4 of this appendix.

* * * * *

1.14 "Ice storage bin" means a container in which ice can be stored.

* * * * *

1.16 "Multiple-compressor" refrigerator or refrigerator-freezer means a refrigerator or refrigerator-freezer with more than one compressor.

1.17 "Precooling" means operating a refrigeration system before initiation of a defrost cycle to reduce one or more compartment temperatures significantly (more than 0.5 °F) below its minimum during stable operation between defrosts.

1.18 "Recovery" means operating a refrigeration system after the conclusion of a defrost cycle to reduce the temperature of one or more compartments to the temperature range that the compartment(s) exhibited during stable operation between defrosts.

* * * * *

1.22 "Stable operation" means operation after steady-state conditions have been achieved but excluding any events associated with defrost cycles. During stable operation the average rate of change of compartment temperature must not exceed 0.042 °F (0.023 °C) per hour for all compartment temperatures. Such a calculation performed for compartment temperatures at any two times, or for any two periods of time comprising complete cycles, during stable operation must meet this requirement.

(A) If compartment temperatures do not cycle, the relevant calculation shall be the difference between the temperatures at two points in time divided by the difference, in hours, between those points in time.

(B) If compartment temperatures cycle as a result of compressor cycling or other cycling operation of any system component (e.g., a damper, fan, or heater), the relevant calculation shall be the difference between compartment temperature averages evaluated for whole compressor cycles or complete temperature cycles divided by the difference, in hours, between either the starts, ends, or mid-times of the two cycles.

* * * * *

1.24 "Through-the-door ice/water dispenser" means a device incorporated within the cabinet, but outside the boundary of the refrigerated space, that delivers to the user on demand ice and may also deliver water from within the refrigerated space without opening an exterior door. This definition includes dispensers that are capable of dispensing ice and water or ice only.

* * * * *

2. Test Conditions

2.1 Ambient Temperature Measurement. Temperature measuring devices shall be shielded so that indicated temperatures are not affected by the operation of the condensing unit or adjacent units.

2.1.1 Ambient Temperature. The ambient temperature shall be recorded at points located 3 feet (91.5 cm) above the floor and 10 inches (25.4 cm) from the center of the two sides of the unit under test. The ambient temperature shall be 90.0 ± 1.0 °F (32.2 ± 0.6 °C) during the stabilization period and the test period.

2.1.2 Ambient Temperature Gradient. The test room vertical ambient temperature gradient in any foot of vertical distance from 2 inches (5.1 cm) above the floor or supporting platform to a height of 1 foot (30.5 cm) above the top of the unit under test is not to exceed 0.5 °F per foot (0.9 °C per meter). The vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. To demonstrate that this requirement has been met, test data must include measurements taken using temperature sensors at locations 10 inches (25.4 cm) from the center of the two sides of the unit under test at heights of 2 inches (5.1 cm) and 36 inches (91.4 cm) above the floor or supporting platform and at a height of 1 foot (30.5 cm) above the unit under test.

2.1.3 Platform. A platform must be used if the floor temperature is not within 3 °F (1.7 °C) of the measured ambient temperature. If a platform is used, it is to have a solid top with all sides open for air circulation underneath, and its top shall extend at least 1 foot (30.5 cm) beyond each side and front of the unit under test and extend to the wall in the rear.

2.2 Operational Conditions. The unit under test shall be installed and its operating conditions maintained in accordance with HRF–1–2008 (incorporated by reference; see § 430.3), sections 5.3.2 through section 5.5.5.5 (excluding section 5.5.5.4). Exceptions and clarifications to the cited sections of HRF–1–2008 are noted in sections 2.3 through 2.8, and 5.1 of this appendix.

* * * * *

2.8 Rear Clearance.

(a) General. The space between the lowest edge of the rear plane of the cabinet and a vertical surface (the test room wall or simulated wall) shall be the minimum distance in accordance with the manufacturer's instructions, unless other provisions of this section apply. The rear plane shall be considered to be the largest flat surface at the rear of the cabinet, excluding features that protrude beyond this surface, such as brackets or compressors.

(b) Maximum clearance. The clearance shall not be greater than 2 inches (51 mm) from the lowest edge of the rear plane to the

vertical surface, unless the provisions of paragraph (c) of this section apply.

(c) If permanent rear spacers or other components that protrude beyond the rear plane extend further than the 2 inch (51 mm) distance, or if the highest edge of the rear plane is in contact with the vertical surface when the unit is positioned with the lowest edge of the rear plane at or further than the 2 inch (51 mm) distance from the vertical surface, the appliance shall be located with the spacers or other components protruding beyond the rear plane, or the highest edge of the rear plane, in contact with the vertical surface.

(d) Rear-mounted condensers. If the product has a flat rear-wall-mounted condenser (i.e., a rear-wall-mounted condenser with all refrigerant tube centerlines within 0.25 inches (6.4 mm) of the condenser plane), and the area of the condenser plane represents at least 25% of the total area of the rear wall of the cabinet, then the spacing to the vertical surface may be measured from the lowest edge of the condenser plane.

* * * * *

2.11 Refrigerators and Refrigerator-Freezers with Demand-Response Capability. Refrigerators and refrigerator-freezers that have a communication module for demand-response functions that is located within the cabinet shall be tested with the communication module in the configuration set at the factory just before shipping.

* * * * *

3. Test Control Settings

3.2 * * *

3.2.1 A first test shall be performed with all compartment temperature controls set at their median position midway between their warmest and coldest settings. For mechanical control systems, (a) knob detents shall be mechanically defeated if necessary to attain a median setting, and (b) the warmest and coldest settings shall correspond to the positions in which the indicator is aligned with control symbols indicating the warmest and coldest settings. For electronic control systems, the test shall be performed with all compartment temperature controls set at the average of the coldest and warmest settings; if there is no setting equal to this average, the setting closest to the average shall be used. If there are two such settings equally close to the average, the higher of these temperature control settings shall be used. A second test shall be performed with all controls set at their warmest setting or all controls set at their coldest setting (not electrically or mechanically bypassed). For all-refrigerators, this setting shall be the appropriate setting that attempts to achieve compartment temperatures measured during the two tests that bound (*i.e.*, one is above and one is below) the standardized temperature for all-refrigerators. For refrigerators and refrigerator-freezers, the second test shall be conducted with all controls at their coldest setting, unless all compartment temperatures measured during the first part of the test are lower than the standardized temperatures, in which case the second test shall be conducted with all controls at their warmest setting. Refer to Table 1 of this appendix for all-refrigerators or Table 2 of this appendix for refrigerators with freezer compartments and refrigerator-freezers to determine which test results to use in the energy consumption calculation. If any compartment is warmer than its standardized temperature for a test with all controls at their coldest position, the tested unit fails the test and cannot be rated.

TABLE 1—TEMPERATURE SETTINGS FOR ALL-REFRIGERATORS

First test		Second test		Energy calculation based on
Settings	Results	Settings	Results	
Mid	Low	Warm	Low	Second Test Only
			High	First and Second Tests
	High	Cold	Low	First and Second Tests
			High	No Energy Use Rating

TABLE 2—TEMPERATURE SETTINGS FOR REFRIGERATORS WITH FREEZER COMPARTMENTS AND REFRIGERATOR-FREEZERS

First test		Second test		Energy calculation based on
Settings	Results	Settings	Results	
Fzr Mid	Fzr Low	Fzr Warm	Fzr Low	Second Test Only
FF Mid	FF Low	FF Warm	FF Low	
			Fzr Low FF High	First and Second Tests.
			Fzr High FF Low	First and Second Tests.
			Fzr High FF High	First and Second Tests.
	Fzr Low	Fzr Cold	Fzr Low	No Energy Use Rating.
	FF High	FF Cold	FF High.	
			Fzr Low FF Low.	First and Second Tests.
	Fzr High	Fzr Cold	Fzr High	No Energy Use Rating.
	FF Low	FF Cold	FF Low.	
			Fzr Low FF Low.	First and Second Tests.
	Fzr High	Fzr Cold	Fzr Low	First and Second Tests.
	FF High	FF Cold	FF Low.	
			Fzr Low FF High.	No Energy Use Rating.
			Fzr High FF Low.	No Energy Use Rating.
			Fzr High FF High.	No Energy Use Rating.

Notes: Fzr = Freezer Compartment, FF = Fresh Food Compartment.

* * * * *

3.3 Optional Test for Models with Two Compartments and User Operable Controls. As an alternative to section 3.2, perform three tests such that the set of tests meets the "minimum requirements for interpolation" of AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) appendix M, section M3, paragraphs (a) through (c) and as illustrated in Figure M1. The target temperatures t_{xA} and t_{xB} defined in section M4(a)(i) of AS/NZ 44474.1:2007 shall be the standardized temperatures defined in section 3.2 of this appendix.

4. Test Period

* * * * *

4.1 Non-automatic Defrost. If the model being tested has no automatic defrost system, the test period shall start after steady-state conditions (see section 2.9 of this appendix) have been achieved and be no less than three hours in duration. During the test period, the compressor motor shall complete two or more whole compressor cycles. (A compressor cycle is a complete "on" and a complete "off" period of the motor.) If no "off" cycling occurs, the test period shall be three hours. If fewer than two compressor cycles occur during a 24-hour period, then a single complete compressor cycle may be used.

4.2 Automatic Defrost. If the model being tested has an automatic defrost system, the test period shall start after steady-state conditions have been achieved and be from one point during a defrost period to the same point during the next defrost period. If the model being tested has a long-time automatic defrost system, the alternative provisions of section 4.2.1 may be used. If the model being tested has a variable defrost control, the provisions of section 4.2.2 shall apply. If the model is a multiple-compressor product with automatic defrost, the provisions of section 4.2.3 shall apply. If the model being tested has long-time automatic or variable defrost control involving multiple defrost cycle types, such as for a product with a single compressor and two or more evaporators in which the evaporators are defrosted at different frequencies, the provisions of section 4.2.4 shall apply. If the model being tested has multiple defrost cycle types for which compressor run time between defrosts is a fixed time of less than 14 hours for all such cycle types, and for which the compressor run times between defrosts for different defrost cycle types are equal to or multiples of each other, the test period shall be from one point of the defrost cycle type with the longest compressor run time between defrosts to the same point during the next occurrence of this defrost cycle type. For such products not using the procedures of section 4.2.4, energy consumption shall be calculated as described in section 5.2.1.1 of this appendix.

* * * * *

4.2.1.1 Cycling Compressor System. For a system with a cycling compressor, the second part of the test starts at the termination of the last regular compressor "on" cycle. The average temperatures of the fresh food and freezer compartments measured from the termination of the previous compressor "on" cycle to the termination of the last regular compressor "on" cycle must both be within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. If any compressor cycles occur prior to the defrost heater being energized that cause the average temperature in either compartment to deviate from its average temperature for the first part of the test by more than 0.5 °F (0.3 °C), these compressor cycles are not considered regular compressor cycles and must be included in the second part of the test. As an example, a "precooling" cycle, which is an extended compressor cycle that lowers the temperature(s) of one or both compartments prior to energizing the defrost heater, must be included in the second part of the test. The test period for the second part of the test ends at the termination of the first regular compressor "on" cycle after both compartment temperatures have fully recovered to their stable conditions. The average temperatures of the compartments measured from this termination of the first regular compressor "on" cycle until the termination of the next regular compressor "on" cycle must both be within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. See Figure 1. Note that Figure 1 illustrates the concepts of precooling and recovery but does not represent all possible defrost cycles.

4.2.3 Multiple-compressor Products with Automatic Defrost.

4.2.3.1 Measurement Frequency. Measurements of power input, cumulative electric energy consumption (watt-hours or kilowatt-hours), and compartment temperature shall be taken at regular intervals not exceeding one minute.

4.2.3.2 Steady-state Condition. Steady state shall be considered to have been attained after 24 hours of operation after the last adjustment of the temperature controls.

4.2.3.3 Primary Compressor. If at least one compressor cycles, test periods shall be based on compressor cycles associated with the primary compressor system (these are referred to as "primary compressor cycles"). If the freezer compressor cycles, it shall be the primary compressor system.

4.2.3.4 Test Periods. The two-part test described in this section shall be used. The first part is a stable continuous period of compressor operation that includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, for any compressor system. The second part is a continuous test period designed to capture the energy consumed during all of the events occurring with the defrost control sequence that are outside of stable operation. The second part of the test shall be conducted separately for each automatic defrost system present.

4.2.3.4.1 First Part of Test. If at least one compressor cycles, the test period for the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 24 hours of stable operation, unless a defrost occurs prior to completion of 24 hours of stable operation, in which case the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 18 hours of stable operation. If no compressor cycles, the first part of the test shall comprise at least 24 hours of stable operation, unless a defrost occurs prior to completion of 24 hours of stable operation, in which case the first part of the test shall comprise at least 18 hours of stable operation.

4.2.3.4.2 Second Part of Test. (a) If at least one compressor cycles, the test period for the second part of the test starts during stable operation before all portions of the defrost cycle, at the beginning of a complete primary compressor cycle. The test period for the second part of the test ends during stable operation after all portions of the defrost cycle, including recovery, at the termination of a complete primary compressor cycle. The start and stop for the test period shall both occur either when the primary compressor starts or when the primary compressor stops. For each compressor system, the compartment temperature averages for the first and last complete compressor cycles that lie completely within the second part of the test must be within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test. If any one of the compressor systems is non-cycling, its compartment temperature averages during the first and last complete primary compressor cycles of the second part of the test must be within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test.

(b) If no compressor cycles, the test period for the second part of the test starts during stable operation before all portions of the defrost cycle, when the compartment temperatures of all compressor systems are within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. The test period for the second part ends during stable operation after all portions of the defrost cycle, including recovery, when the compartment temperatures of all compressor systems are within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test.

5. Test Measurements

* * * * *

5.1 Temperature Measurements. (a) Temperature measurements shall be made at the locations prescribed in Figures 5.1 and 5.2 of HRF–1–2008 (incorporated by reference; see § 430.3) and shall be accurate to within ±0.5 °F (0.3 °C). No freezer temperature measurements need be taken in an all-refrigerator model.

(b) If the interior arrangements of the unit under test do not conform with those shown in Figure 5.1 and 5.2 of HRF–1–2008, the unit must be tested by relocating the temperature sensors from the locations specified in the figures to avoid interference with hardware or components within the unit, in which case the specific locations used for the temperature sensors shall be noted in the test data records maintained by the manufacturer in accordance with 10 CFR 429.71, and the certification report shall indicate that non-standard sensor locations were used. If any temperature sensor is relocated by any amount from the location prescribed in Figure 5.1 or 5.2 of HRF–1–2008 in order to maintain a minimum 1-inch air space from adjustable shelves or other

components that could be relocated by the consumer, this constitutes a relocation of temperature sensors that shall be recorded in the test data and reported in the certification report as described above.

5.1.1 Measured Temperature. The measured temperature of a compartment is the average of all sensor temperature readings taken in that compartment at a particular point in time. Measurements shall be taken at regular intervals not to exceed 4 minutes. Measurements for products with multiple compressor systems shall be taken at regular intervals not to exceed one minute.

5.1.2 Compartment Temperature. The compartment temperature for each test period shall be an average of the measured temperatures taken in a compartment during the test period as defined in section 4 of this appendix. For long time automatic defrost models, compartment temperatures shall be those measured in the first part of the test period specified in section 4.2.1 of this appendix. For models with variable defrost controls, compartment temperatures shall be those measured in the first part of the test period specified in section 4.2.2 of this appendix. For models with automatic defrost that is neither long-time nor variable defrost, the compartment temperature shall be an average of the measured temperatures taken in a compartment during a stable period of compressor operation that (a) includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, (b) is no less than three hours in duration, and (c) includes two or more whole compressor cycles. If the compressor does not cycle, the stable period used for the temperature average shall be three hours in duration.

* * * * *

5.2 * * *

5.2.1 * * *

5.2.1.3 Variable Defrost Control. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

ET = (1440 × EP1/T1) + (EP2 − (EP1 × T2/T1)) × (12/CT).

Where:

1440 is defined in 5.2.1.1 and EP1, EP2, T1, T2, and 12 are defined in 5.2.1.2;

$CT = (CT_L \times CT_M)/(F \times (CT_M - CT_L) + CT_L)$;

CT_L = the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours), or the shortest compressor run time between defrosts observed for the test (if it is shorter than the shortest run time used in the control algorithm and is greater than 6 hours), or 6 hours (if the shortest observed run time is less than 6 hours), in hours rounded to the nearest tenth of an hour;

CT_M = maximum compressor run time between defrosts in hours rounded to the nearest tenth of an hour (greater than CT_L but not more than 96 hours);

F = ratio of per day energy consumption in excess of the least energy and the maximum difference in per day energy consumption and is equal to 0.20.

For variable defrost models with no values for CT_L and CT_M in the algorithm, the default values of 6 and 96 shall be used, respectively.

5.2.1.4 Multiple Compressor Products with Automatic Defrost. For multiple compressor products, the two part test method in section 4.2.3.4 of this appendix must be used. The energy consumption in kilowatt hours per day shall be calculated equivalent to:

$$ET = \left(1440 \times \frac{EP1}{T1}\right) + \sum_{i=1}^{D}\left[\left(EP2_i - \left(EP1 \times \frac{T2_i}{T1}\right)\right) \times \left(\frac{12}{CT_i}\right)\right]$$

Where:

1440, EP1, T1, and 12 are defined in 5.2.1.2;

i = a variable that can equal 1, 2, or more that identifies each individual compressor system that has automatic defrost;

D = the total number of compressor systems with automatic defrost;

$EP2_i$ = energy expended in kilowatt-hours during the second part of the test for compressor system i;

$T2_i$ = length of time in minutes of the second part of the test for compressor system i;

CT_i = the compressor run time between defrosts for compressor system i in hours rounded to the nearest tenth of an hour, for long-time automatic defrost control equal to a fixed time in hours, and for variable defrost control equal to

$(CT_{Li} \times CT_{Mi})/(F \times (CT_{Mi} - CT_{Li}) + CT_{Li})$;

Where:

CT_{Li} = for compressor system i, the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours), or the shortest compressor run time between defrosts observed for the test (if it is shorter than the shortest run time used in the control algorithm and is greater than 6 hours), or 6 hours (if the shortest observed run time is less than 6 hours), in hours rounded to the nearest tenth of an hour;

CT_{Mi} = for compressor system i, the maximum compressor run time between defrosts in hours rounded to the nearest tenth of an hour (greater than CT_{Li} but not more than 96 hours); and

F = default defrost energy consumption factor, equal to 0.20.

For variable defrost models with no values for CT_{Li} and CT_{Mi} in the algorithm, the default values of 6 and 96 shall be used, respectively.

* * * * *

5.3 Volume Measurements. (a) The unit's total refrigerated volume, VT, shall be measured in accordance with HRF–1–2008 (incorporated by reference; see § 430.3), section 3.30 and sections 4.2 through 4.3. The measured volume shall include all spaces within the insulated volume of each compartment except for the volumes that must be deducted in accordance with section 4.2.2 of HRF–1–2008, and be calculated equivalent to:

VT = VF + VFF

Where:

VT = total refrigerated volume in cubic feet,

VF = freezer compartment volume in cubic feet, and

VFF = fresh food compartment volume in cubic feet.

(b) In the case of products with automatic icemakers, the volume occupied by the automatic icemaker, including its ice storage bin, is to be included in the volume measurement.

(c) Total refrigerated volume is determined by physical measurement of the test unit. Measurements and calculations used to determine the total refrigerated volume shall be retained as part of the test records underlying the certification of the basic model in accordance with 10 CFR 429.71.

* * * * *

6. Calculation of Derived Results From Test Measurements

* * * * *

6.2 Average Per-Cycle Energy Consumption. The average per-cycle energy consumption for a cycle type, E, is expressed in kilowatt-hours per cycle to the nearest one hundredth (0.01) kilowatt-hour and shall be calculated according to the sections below.

6.2.1 All-Refrigerator Models. The average per-cycle energy consumption shall depend upon the temperature attainable in the fresh food compartment as shown below.

* * * * *

6.2.2 Refrigerators and Refrigerator-Freezers. The average per-cycle energy consumption shall be defined in one of the following ways as applicable.

6.2.2.1 If the fresh food compartment temperature is at or below 39 °F (3.9 °C) during both tests and the freezer compartment temperature is at or below 15°F (−9.4 °C) during both tests of a refrigerator or at or below 0°F (−17.8 °C) during both tests of a refrigerator-freezer, the average per-cycle energy consumption shall be:

E = ET1 + IET

Where:

ET is defined in 5.2.1;

IET, expressed in kilowatt-hours per cycle, equals 0 (zero) for products without an automatic icemaker, and equals 0.23 for products with an automatic icemaker; and

The number 1 indicates the test period during which the highest freezer compartment temperature was measured.

6.2.2.2 If the conditions of 6.2.2.1 do not exist, the average per-cycle energy consumption shall be defined by the higher of the two values calculated by the following two formulas:

$E = ET1 + ((ET2 - ET1) \times (39.0 - TR1)/(TR2 - TR1)) + IET$

and

$E = ET1 + ((ET2 - ET1) \times (k - TF1)/(TF2 - TF1)) + IET$

Where:

ET is defined in 5.2.1;
IET is defined in 6.2.2.1;
TR and the numbers 1 and 2 are defined in 6.2.1.2;
TF = freezer compartment temperature determined according to 5.1.4 in degrees F; 39.0 is the standardized temperature for fresh food compartments in degrees F; and
k is a constant 15.0 for refrigerators or 0.0 for refrigerator-freezers, each being standardized freezer compartment temperatures in degrees F.

6.2.2.3 Optional Test for Models with Two Compartments and User Operable Controls. If the procedure of section 3.3 of this appendix is used for setting temperature controls, the average per-cycle energy consumption shall be defined as follows:

$E = E_x + IET$

Where:

E is defined in 6.2.1.1;
IET is defined in 6.2.2.1; and
E_x is defined and calculated as described in AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) appendix M, section M4(a). The target temperatures t_{xA} and t_{xB} defined in section M4(a)(i) of AS/NZS 44474.1:2007 shall be the standardized temperatures defined in section 3.2 of this appendix.

* * * * *

■ 10. Appendix B to subpart B of part 430 is amended:
■ a. By revising the introductory text;
■ b. In section 1. Definitions, by:
■ i. Redesignating section 1.15 as 1.21;
■ ii. Redesignating section 1.14 as 1.19;
■ iii. Redesignating section 1.13 as 1.17;
■ iv. Redesignating section 1.12 as 1.16;
■ v. Redesignating section 1.11 as 1.15;
■ vi. Redesignating section 1.10 as 1.13;
■ vii. Redesignating section 1.9 as 1.11;
■ viii. Redesignating sections 1.6 through 1.8 as 1.7 through 1.9 respectively;
■ ix. Adding sections 1.6, 1.10, 1.12, 1.14, 1.18, and 1.20;
■ c. In section 2. Test Conditions, by;
■ i. Revising sections 2.1, 2.2, 2.3, and 2.6;
■ ii. Adding sections 2.1.1, 2.1.2, 2.1.3, 2.8, and 2.9;
■ d. Revising section 3.2.1 and Table 1 in section 3. Test Control Settings;
■ e. Revising sections 4.1 and 4.2.1.1 in section 4. Test Period;
■ f. Revising sections 5.1, 5.1.2, 5.2.1.3, and 5.3 in section 5. Test Measurements;
■ g. In section 6. Calculation of Derived Results from Test Measurements, by:
■ i. Revising section 6.2;
■ ii. Removing section 6.2.1;
■ iii. Redesignating section 6.2.1.1 as 6.2.1 and revising the newly designated section 6.2.1;
■ iv. Redesignating section 6.2.1.2 as 6.2.2 and revising the newly designated section 6.2.2;
■ v. Redesignating section 6.2.2 as 6.2.3 and revising the newly designated section 6.2.3.

The additions and revisions read as follows:

Appendix B to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Freezers

Beginning on September 15, 2014, the test procedures in appendix B must be used to determine compliance with energy conservation standards for freezers. Prior to September 15, 2014, manufacturers may continue to use appendix B1 or may elect to use appendix B early to show compliance with the September 15, 2014 energy conservation standards. Manufacturers must use a single appendix for all representations of energy use of a basic model, including certifications of compliance, and may not use appendix B1 for certain representations and appendix B for other representations.

1. Definitions

* * * * *

1.6 "Complete temperature cycle" means a time period defined based upon the cycling of compartment temperature that starts when the compartment temperature is at a maximum and ends when the compartment temperature returns to an equivalent maximum (within 0.5 °F of the starting temperature), having in the interim fallen to a minimum and subsequently risen again to reach the second maximum. Alternatively, a complete temperature cycle can be defined to start when the compartment temperature is at a minimum and end when the compartment temperature returns to an equivalent minimum (within 0.5 °F of the starting temperature), having in the interim risen to a maximum and subsequently fallen again to reach the second minimum.

* * * * *

1.10 "Ice storage bin" means a container in which ice can be stored.

* * * * *

1.12 "Precooling" means operating a refrigeration system before initiation of a defrost cycle to reduce one or more compartment temperatures significantly (more than 0.5 °F) below its minimum during stable operation between defrosts.

* * * * *

1.14 "Recovery" means operating a refrigeration system after the conclusion of a defrost cycle to reduce the temperature of one or more compartments to the temperature range that the compartment(s) exhibited during stable operation between defrosts.

* * * * *

1.18 "Stable operation" means operation after steady-state conditions have been achieved but excluding any events associated with defrost cycles. During stable operation the average rate of change of compartment temperature must not exceed 0.042 °F (0.023 °C) per hour. Such a calculation performed for compartment temperatures at any two times, or for any two periods of time comprising complete cycles, during stable operation must meet this requirement.

(a) If compartment temperatures do not cycle, the relevant calculation shall be the difference between the temperatures at two points in time divided by the difference, in hours, between those points in time.

(b) If compartment temperatures cycle as a result of compressor cycling or other cycling operation of any system component (e.g., a damper, fan, or heater), the relevant calculation shall be the difference between compartment temperature averages evaluated for whole compressor cycles or complete temperature cycles divided by the difference, in hours, between either the starts, ends, or mid-times of the two cycles.

* * * * *

1.20 "Through-the-door ice/water dispenser" means a device incorporated within the cabinet, but outside the boundary of the refrigerated space, that delivers to the user on demand ice and may also deliver water from within the refrigerated space without opening an exterior door. This definition includes dispensers that are capable of dispensing ice and water or ice only.

* * * * *

2. Test Conditions

2.1 Ambient Temperature Measurement. Temperature measuring devices shall be shielded so that indicated temperatures are not affected by the operation of the condensing unit or adjacent units.

2.1.1 Ambient Temperature. The ambient temperature shall be recorded at points located 3 feet (91.5 cm) above the floor and 10 inches (25.4 cm) from the center of the two sides of the unit under test. The ambient temperature shall be 90.0 ±1.0 °F (32.2 ±0.6 °C) during the stabilization period and the test period.

2.1.2 Ambient Temperature Gradient. The test room vertical ambient temperature gradient in any foot of vertical distance from 2 inches (5.1 cm) above the floor or supporting platform to a height of 1 foot (30.5 cm) above the top of the unit under test is not to exceed 0.5 °F per foot (0.9 °C per meter). The vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. To demonstrate that this requirement has been met, test data must include measurements taken using temperature sensors at locations 10 inches (25.4 cm) from the center of the two sides of the unit under test at heights of 2 inches (5.1 cm) and 36 inches (91.4 cm) above the floor or supporting platform and at a height of 1 foot (30.5 cm) above the unit under test.

2.1.3 Platform. A platform must be used if the floor temperature is not within 3 °F (1.7 °C) of the measured ambient temperature. If

a platform is used, it is to have a solid top with all sides open for air circulation underneath, and its top shall extend at least 1 foot (30.5 cm) beyond each side and front of the unit under test and extend to the wall in the rear.

2.2 Operational Conditions. The freezer shall be installed and its operating conditions maintained in accordance with HRF–1–2008 (incorporated by reference; see § 430.3), sections 5.3.2 through section 5.5.5.5 (but excluding sections 5.5.5.2 and 5.5.5.4). The quick freeze option shall be switched off except as specified in section 3.1 of this appendix. Additional clarifications are noted in sections 2.3 through 2.9 of this appendix.

2.3 Anti-Sweat Heaters. The anti-sweat heater switch is to be on during one test and off during a second test. In the case of a freezer with variable anti-sweat heater control, the standard cycle energy use shall be the result of the calculation described in 6.2.3.

* * * * *

2.6 Rear Clearance.

(a) General. The space between the lowest edge of the rear plane of the cabinet and a vertical surface (the test room wall or simulated wall) shall be the minimum distance in accordance with the manufacturer's instructions, unless other provisions of this section apply. The rear plane shall be considered to be the largest flat surface at the rear of the cabinet, excluding features that protrude beyond this surface, such as brackets or compressors.

(b) Maximum clearance. The clearance shall not be greater than 2 inches (51 mm) from the lowest edge of the rear plane to the vertical surface, unless the provisions of subsection (c) of this section apply.

(c) If permanent rear spacers or other components that protrude beyond the rear plane extend further than the 2 inch (51 mm) distance, or if the highest edge of the rear plane is in contact with the vertical surface when the unit is positioned with the lowest edge of the rear plane at or further than the 2 inch (51 mm) distance from the vertical surface, the appliance shall be located with the spacers or other components protruding beyond the rear plane, or the highest edge of the rear plane, in contact with the vertical surface.

(d) Rear-mounted condensers. If the product has a flat rear-wall-mounted condenser (*i.e.*, a rear-wall-mounted condenser with all refrigerant tube centerlines within 0.25 inches (6.4 mm) of the condenser plane), and the area of the condenser plane represents at least 25% of the total area of the rear wall of the cabinet, then the spacing to the vertical surface may be measured from the lowest edge of the condenser plane.

* * * * *

2.8 Freezers with Demand-Response Capability. Freezers that have a communication module for demand-response functions that is located within the cabinet shall be tested with the communication module in the configuration set at the factory just before shipping.

2.9 For products that require the freezer compartment to be loaded with packages in accordance with section 5.5.5.3 of HRF–1–2008, the number of packages comprising the 75% load shall be determined by filling the compartment completely with the packages that are to be used for the test, such that the packages fill as much of the usable refrigerated space within the compartment as is physically possible, and then removing from the compartment a number of packages so that the compartment contains 75% of the packages that were placed in the compartment to completely fill it. If multiplying the total number of packages by 0.75 results in a fraction, the number of packages used shall be rounded to the nearest whole number, rounding up if the result ends in 0.5. For multi-shelf units, this method shall be applied to each shelf. For both single- and multi-shelf units, the remaining packages shall be arranged as necessary to provide the required air gap and thermocouple placement. The number of packages comprising the 100% and 75% loading conditions shall be recorded in the test data maintained in accordance with 10 CFR 429.71.

3. Test Control Settings

* * * * *

3.2 * * *

3.2.1 A first test shall be performed with all temperature controls set at their median position midway between their warmest and coldest settings. For mechanical control systems, (a) knob detents shall be mechanically defeated if necessary to attain a median setting, and (b) the warmest and coldest settings shall correspond to the positions in which the indicator is aligned with control symbols indicating the warmest and coldest settings. For electronic control systems, the test shall be performed with all compartment temperature controls set at the average of the coldest and warmest settings; if there is no setting equal to this average, the setting closest to the average shall be used. If there are two such settings equally close to the average, the higher of these temperature control settings shall be used. A second test shall be performed with all controls set at either their warmest or their coldest setting (not electrically or mechanically bypassed), whichever is appropriate, to attempt to achieve compartment temperatures measured during the two tests that bound (*i.e.*, one is above and one is below) the standardized temperature. If the compartment temperatures measured during these two tests bound the standardized temperature, then these test results shall be used to determine energy consumption. If the compartment temperature measured with all controls set at their coldest setting is above the standardized temperature, the tested unit fails the test and cannot be rated. If the compartment temperature measured with all controls set at their warmest setting is below the standardized temperature, then the result of this test alone will be used to determine energy consumption. Also see Table 1 of this appendix, which summarizes these requirements.

TABLE 1—TEMPERATURE SETTINGS FOR FREEZERS

First test		Second test		Energy calculation based on
Settings	Results	Settings	Results	
Mid	Low	Warm	Low	Second Test Only
			High	First and Second Tests
	High	Cold	Low	First and Second Tests
			High	No Energy Use Rating

* * * * *

4. Test Period

* * * * *

4.1 Non-automatic Defrost. If the model being tested has no automatic defrost system, the test period shall start after steady-state conditions (see section 2.7 of this appendix) have been achieved and be no less than three hours in duration. During the test period, the compressor motor shall complete two or more whole compressor cycles. (A whole compressor cycle is a complete "on" and a complete "off" period of the motor.) If no "off" cycling occurs, the test period shall be three hours. If less than two compressor cycles occur during a 24-hour period, then a single complete compressor cycle may be used.

* * * * *

4.2 * * *

4.2.1 * * *

4.2.1.1 Cycling Compressor System. For a system with a cycling compressor, the second part of the test starts at the termination of the last regular compressor "on" cycle. The average temperature of the compartment measured from the termination of the previous compressor "on" cycle to the termination of the last regular compressor "on" cycle must be within 0.5 °F (0.3 °C) of the average temperature of the compartment measured for the first part of the test. If any compressor cycles occur prior to the defrost heater being energized that cause the average temperature in the compartment to deviate from the average temperature for the first part of the test by more than 0.5 °F (0.3 °C), these compressor cycles are not considered regular

compressor cycles and must be included in the second part of the test. As an example, a "precooling" cycle, which is an extended compressor cycle that lowers the compartment temperature prior to energizing the defrost heater, must be included in the second part of the test. The test period for the second part of the test ends at the termination of the first regular compressor "on" cycle after the compartment temperatures have fully recovered to their stable conditions. The average temperature of the compartment measured from this termination of the first regular compressor "on" cycle until the termination of the next regular compressor "on" cycle must be within 0.5 °F (0.3 °C) of the average temperature of the compartment measured for the first part of the test. See Figure 1. Note that Figure 1 illustrates the concepts of precooling and recovery but does not represent all possible defrost cycles.

* * * * *

5. Test Measurements

* * * * *

5.1 Temperature Measurements. (a) Temperature measurements shall be made at the locations prescribed in Figure 5.2 of HRF–1–2008 (incorporated by reference; see § 430.3) and shall be accurate to within ±0.5 °F (0.3 °C).

(b) If the interior arrangements of the unit under test do not conform with those shown in Figure 5.2 of HRF–1–2008, the unit may be tested by relocating the temperature sensors from the locations specified in the figures to avoid interference with hardware or components within the unit, in which case the specific locations used for the temperature sensors shall be noted in the test data records maintained by the manufacturer in accordance with 10 CFR 429.71, and the certification report shall indicate that non-standard sensor locations were used. If any temperature sensor is relocated by any amount from the location prescribed in Figure 5.2 of HRF–1–2008 in order to maintain a minimum 1-inch air space from adjustable shelves or other components that could be relocated by the consumer, this constitutes a relocation of temperature sensors that shall be recorded in the test data and reported in the certification report as described above.

* * * * *

5.1.2 Compartment Temperature. The compartment temperature for each test period shall be an average of the measured temperatures taken in a compartment during the test period as defined in section 4 of this appendix. For long-time automatic defrost models, compartment temperature shall be that measured in the first part of the test period specified in section 4.2.1 of this appendix. For models with variable defrost controls, compartment temperature shall be that measured in the first part of the test period specified in section 4.2.2 of this appendix. For models with automatic defrost that is neither long-time nor variable defrost, the compartment temperature shall be an average of the measured temperatures taken in a compartment during a stable period of compressor operation that (a) includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, (b) is no less than three hours in duration, and (c) includes two or more whole compressor cycles. If the compressor does not cycle, the stable period used for the temperature average shall be three hours in duration.

* * * * *

5.2 * * *

5.2.1 * * *

5.2.1.3 Variable Defrost Control. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$ET = (1440 \times EP1/T1) + (EP2 - (EP1 \times T2/T1)) \times (12/CT)$,

Where:

1440 is defined in 5.2.1.1 and EP1, EP2, T1, T2, and 12 are defined in 5.2.1.2;

$CT = (CT_L \times CT_M)/(F \times (CT_M - CT_L) + CT_L)$;

CT_L = the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours), or the shortest compressor run time between defrosts observed for the test (if it is shorter than the shortest run time used in the control algorithm and is greater than 6 hours), or 6 hours (if the shortest observed run time is less than 6 hours), in hours rounded to the nearest tenth of an hour,

CT_M = maximum compressor run time between defrosts in hours rounded to the nearest tenth of an hour (greater than CT_L but not more than 96 hours),

F = ratio of per-day energy consumption in excess of the least energy and the maximum difference in per-day energy consumption and is equal to 0.20

For variable defrost models with no values for CT_L and CT_M in the algorithm, the default values of 6 and 96 shall be used, respectively.

* * * * *

5.3 Volume Measurements. (a) The unit's total refrigerated volume, VT, shall be measured in accordance with HRF–1–2008 (incorporated by reference; see § 430.3), section 3.30 and sections 4.2 through 4.3. The measured volume shall include all spaces within the insulated volume of each compartment except for the volumes that must be deducted in accordance with section 4.2.2 of HRF–1–2008.

(b) In the case of freezers with automatic icemakers, the volume occupied by the automatic icemaker, including its ice storage bin, is to be included in the volume measurement.

(c) Total refrigerated volume is determined by physical measurement of the test unit. Measurements and calculations used to determine the total refrigerated volume shall be retained as part of the test records underlying the certification of the basic model in accordance with 10 CFR 429.71.

* * * * *

6. Calculation of Derived Results From Test Measurements

* * * * *

6.2 Average Per-Cycle Energy Consumption. The average per-cycle energy consumption for a cycle type, E, is expressed in kilowatt-hours per cycle to the nearest one hundredth (0.01) kilowatt-hour, and shall be calculated according to the sections below.

6.2.1 If the compartment temperature is always below 0.0 °F (−17.8 °C), the average per-cycle energy consumption shall be equivalent to:

E = ET1 + IET

Where:

ET is defined in 5.2.1;

The number 1 indicates the test period during which the highest compartment temperature is measured; and

IET, expressed in kilowatt-hours per cycle, equals 0 (zero) for products without an automatic icemaker, and equals 0.23 for products with an automatic icemaker.

6.2.2 If one of the compartment temperatures measured for a test period is greater than 0.0 °F (17.8 °C), the average per-cycle energy consumption shall be equivalent to:

E = ET1 + ((ET2 − ET1) × (0.0 − TF1)/(TF2 − TF1)) + IET

Where:

IET is defined in 6.2.1 and ET is defined in 5.2.1;

TF = freezer compartment temperature determined according to 5.1.3 in degrees F;

The numbers 1 and 2 indicate measurements taken during the first and second test period as appropriate, and

0.0 = standardized compartment temperature in degrees F.

6.2.3 Variable Anti-Sweat Heater Models. The standard cycle energy consumption of a freezer with a variable anti-sweat heater control (E_{vad}), expressed in kilowatt-hours per day, shall be calculated equivalent to:

$E_{vad} = E + (Correction\ Factor)$ where E is determined by 6.2.1, or 6.2.2, whichever is appropriate, with the anti-sweat heater switch in the "off" position or, for a product without an anti-sweat heater switch, the anti-sweat heater in its lowest energy use state

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) × (1 kW/1000 W)

Where:

Anti-sweat Heater Power = 0.034 * (Heater Watts at 5%RH)
+ 0.211 * (Heater Watts at 15%RH)
+ 0.204 * (Heater Watts at 25%RH)
+ 0.166 * (Heater Watts at 35%RH)
+ 0.126 * (Heater Watts at 45%RH)
+ 0.119 * (Heater Watts at 55%RH)
+ 0.069 * (Heater Watts at 65%RH)
+ 0.047 * (Heater Watts at 75%RH)
+ 0.008 * (Heater Watts at 85%RH)
+ 0.015 * (Heater Watts at 95%RH)

Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72 °F ambient (22.2 °C), and DOE reference freezer (FZ) average temperature of 0 °F (−17.8 °C).

System-loss Factor = 1.3

* * * * *

[FR Doc. 2014–08644 Filed 4–18–14; 8:45 a.m.]

BILLING CODE 6450–01–P

Reader Aids

Federal Register

Vol. 79, No. 76

Monday, April 21, 2014

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.ldsys.gov**.

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov**.

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings)*; then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings)*; then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, APRIL

18153–18440	1
18441–18610	2
18611–18764	3
18765–18984	4
18985–19286	7
19287–19460	8
19461–19804	9
19805–20090	10
20091–20752	11
20753–21118	14
21119–21384	15
21385–21580	16
21581–21844	17
21845–22008	18
22009–22356	21

CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:

9092	18763
9093	18975
9094	18977
9095	18979
9096	18981
9097	18983
9098	18985
9099	19799
9100	19801
9101	20089
9102	20745
9103	21119
9104	21579

Executive Orders

11246 (Amended by 13665)	20747
13664	19283
13665	20747

Administrative Orders

Memorandums:

Memorandum of April 8, 2014	20749

Notices:

Notice of April 7, 2014	19803

5 CFR

532	21121
950	21581

Proposed Rules:

1201	18658

6 CFR

5	18441

7 CFR

33	18765
301	21595, 21598
319	19805
322	19805
360	19805
905	19461
1214	18987
1400	21086
1416	21086
1463	19462

Proposed Rules:

28	18211
319	19838, 19840, 21153
457	20110
920	19501
987	19028
1703	18482
1709	18482
1710	18482
1717	18482
1720	18482
1721	18482
1724	18482
1726	18482
1737	18482
1738	18482
1739	18482
1740	18482
1753	18482
1774	18482
1775	18482
1779	18482
1780	18482
1781	18482
1782	18482
1924	18482
1940	18482
1942	18482
1944	18482
1948	18482
1951	18482
1955	18482
1962	18482
1970	18482
1980	18482
3550	18482
3560	18482
3565	18482
3570	18482
3575	18482
4274	18482
4279	18482
4280	18482
4284	18482
4290	18482

9 CFR

Proposed Rules

112	22048
391	22052

10 CFR

72	20753, 21121
429	22278, 22320
430	20091, 22320
431	22278

Proposed Rules:

50	19501
51	22055
72	21156
170	21036
171	21036
429	19844
430	18661
431	19293, 19844, 20114

12 CFR

303	20754
308	20754
324	20754
327	20754
333	20754
337	20754
347	20754
349	20754
360	20754
362	20754

363 20754
364 20754
365 20762
380 20754
390 20754
391 20754
630 21598

Proposed Rules:

34 19521
208 19521
225 19521
308 22056
323 19521
335 22063
390 ..... 19521, 22056, 22063
1026 19521
1222 19521

13 CFR

Proposed Rules:

102 19544

14 CFR

25 ..... 20768, 21845
36 20769
39 ..... 18611, 18615, 18617, 18619, 18622, 18626, 18629, 18987, 19812, 21385, 21387, 21389, 21392, 21845
71 ..... 18153, 18154, 18155, 18442, 19287, 20769, 21598, 21600, 21601, 21846, 21847
91 ..... 19288, 22009
97 ..... 21602, 21604
120 22009
135 22009
1201 18443
1260 21125
1273 21125
1274 21125

Proposed Rules:

25 ..... 20818, 21413
39 ..... 18846, 18848, 19294, 19296, 19299, 19546, 19548, 19844, 19846, 20138, 20819, 20824, 20827, 20829, 20832, 20834, 20837, 20839, 21158, 21160, 21413, 21416, 21648, 21651, 21655, 22069
71 ..... 18482, 19030
121 18212

15 CFR

744 21394

Proposed Rules:

730 19552
742 19552
748 19552
762 19552
772 19552
922 ..... 20982, 21658

16 CFR

303 18766
305 19464

Proposed Rules:

306 18850

17 CFR

Proposed Rules:

200 18483
229 18483
230 ..... 18483, 19564
232 18483
239 18483
240 18483
243 18483
249 18483
270 19564

18 CFR

35 18775
341 21126

Proposed Rules:

284 18223

19 CFR

Proposed Rules:

201 21658

20 CFR

718 21606
725 21606

21 CFR

1 18799
14 20094
73 20095
179 20771
510 ..... 18156, 19814, 19816
516 18156
520 18156
522 ..... 18156, 21126
526 18156
556 18990
558 ..... 18156, 18990, 19814, 19816
886 22012
890 20779

Proposed Rules:

1 ..... 18866, 18867
172 19301

22 CFR

41 19288
126 21616
173 22016
303 19816

26 CFR

1 ..... 18159, 18161, 21617
602 18161

Proposed Rules:

1 21163

29 CFR

1910 ..... 20316, 21848
1917 22018
1926 20316
1985 18630
2700 20098
4022 21127

Proposed Rules:

1910 21876
1926 21164
4001 18483
4022 18483
4044 18483

30 CFR

585 21617
590 21617
723 18444
724 18444
845 18444
846 18444

31 CFR

560 18990

32 CFR

117 19467
156 18161

33 CFR

100 ..... 18167, 18169, 18448, 18995, 19478, 20783
117 ..... 18181, 18996, 20784, 20785, 20786, 21128, 21626, 21628
165 ..... 18169, 19289, 19480, 19483, 20786, 20789, 20792, 20794, 20796, 21129, 21629, 22020, 22023
177 20797
334 18450

Proposed Rules:

1 22071
100 ..... 20841, 21661
117 18243
140 20844
141 20844
142 20844
143 20844
144 20844
145 20844
146 20844
147 ..... 19569, 20844
165 ..... 18245, 19031, 19034, 19302, 19572, 20851, 21166
328 22188

34 CFR

Proposed Rules:

Ch. III 18490, 21170, 21418, 21663
Ch. VI 20139

36 CFR

Proposed Rules:

1 21876
2 21876
7 21876

39 CFR

961 22025

Proposed Rules:

3050 18661

40 CFR

9 20800
51 18452
52 ..... 18183, 18453, 18644, 18802, 18997, 18999, 19001, 19009, 19012, 19820, 20098, 20099, 21137, 21139, 21142, 21144, 21631, 21849, 21852, 21855, 21857, 22028, 22032
60 18952
62 21146
69 22032
81 21857
180 ..... 18456, 18461, 18467, 18805, 18810, 18815, 18818, 19485, 20100
282 19830
721 20800
761 18471
799 18822

Proposed Rules:

52 ..... 18248, 18868, 19036, 20139, 21173, 21178, 21179, 21421, 21424, 21668, 21669, 21679, 21882
62 21187
81 ..... 18248, 20139
110 22188
112 22188
116 22188
117 22188
122 22188
131 18494
228 22073
230 22188
232 22188
241 21006
300 ..... 19037, 22188
302 22188
401 22188
761 18497
770 19305

41 CFR

102-42 18477

Proposed Rules:

102-36 19575

42 CFR

85a 19835

Proposed Rules:

100 21187
85a 19848
403 21552
416 21552
418 21552
460 21552
482 21552
483 21552
485 21552

44 CFR

64 ..... 18825, 21397

45 CFR

18 20801
1613 21148
1626 21861

Proposed Rules:

1351 21064
1614 21188

46 CFR

Proposed Rules:

10 20844
11 20844
12 20844
13 20844
14 20844
15 20844
69 19420

47 CFR

73 19014
79 21399
90 20105

Proposed Rules:

1 ..... 18249, 20854
36 18498
76 19849
80 18249
95 18249

48 CFR

201 22036
212 22036
216 22036
246 18654
247 22036
252 ..... 22036, 22041, 22042
552 ..... 20106, 21400

Proposed Rules:

1 18503

3 18503
12 18503
52 18503
511 21691
538 21691
552 21691
915 18416
934 18416
942 18416
944 18416
945 18416
952 18416
1516 19039
1552 19039

49 CFR

21 21402
27 21402
37 21402
38 21402
229 21636
390 19835
571 19178
1333 21407

Proposed Rules:

Ch. X 19042

50 CFR

17 ..... 18190, 19712, 19760, 19974, 20073, 20107
32 21874
92 19454
223 20802
224 20802
300 ..... 18827, 19487
622 ..... 19490, 19836, 21636, 21875
635 20108
648 ..... 18478, 18834, 18844, 19497, 22043
660 ..... 19498, 21639
679 ..... 18654, 18655, 18845, 19500, 21151
697 ..... 19015, 22043

Proposed Rules:

17 ..... 18869, 19307, 19314, 19860, 22076, 22077
222 21695
223 21695
229 21695
635 18870
648 ..... 19861, 20161
660 18876
679 21882

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List April 17, 2014

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.